Jeremiah Smith 1791

HISTORY

OF THE

ENGLISH LAW,

FROM THE

TIME of the SAXONS,

TO THE

END of the REIGN of PHILIP and MARY.

By JOHN REEVES, Esq.
BARRISTER AT LAW.

THE SECOND EDITION.

IN FOUR VOLUMES.

VOL. IV.

DUBLIN:
Printed for LUKE WHITE, No. 86, Dame-Street.
M,DCC,LXXXVII.

5 UK 905 REE

JUL 15 1911

CONTENTS

OF THE

FOURTH VOLUME.

CHAP. XXIV.

HENRY VI. EDWARD IV.

OF the Canon Law—Of Biſhops—Officials—Of Things—Of Offences—Of Proceedings in Civil Suits—The Libel—Litis Conteſtatio—Dilationes—Miſſio in Bona—Of Sequeſtration—Of Proof—Of Witneſſes—Of Exceptions—Appeals—Of Proceedings in Criminal Suits—Accuſation—Inquiſition—Denunciation—Purgation—Excommunication—Interdict—Suſpenſion. 1

CHAP. XXV.

HENRY VI. EDWARD IV.

Of Eccleſiaſtical Juriſdiction—Of Matrimony—Eſpouſals—Nuptiæ—Of Cognation—Conſanguinity—Affinity—Of Divorce—Jactitation of Marriage—Of Wills and Teſtaments—Executors—Of the Forms of Wills, &c.—Of Probate—Of Inteſtacy—Of Pious Uſes—The Rationabilis Pars—Tithes—Sylva Cædua—Compoſition for Tithes—Spoliation—Suits de Læſione Fidei—Defamation—Eccleſiaſtical Courts—Prohibitions—Provincial Conſtitutions—King and Government—The Statutes—Forteſcue—Littleton—Lyndwode—Printing of Law-Books—Miſcellaneous Facts. 45

CHAP.

CONTENTS.

CHAP. XXVI.

EDWARD V. RICHARD III.

Ceſtui que uſe to make Eſtates—Benevolences aboliſhed —Bailing Felons by Juſtices—Fines—Private Acts. 126

CHAP. XXVII.

HENRY VII.

Attending the King in his Wars—Vagrants—Corporations—Statute of Fines—Statutes of Pernors of Profits —Alienations of Jointreſſes made void—Suits in Formâ Pauperis—Attaints——Stealing Women—The Star-Chamber new-modelled—Informations at the Aſſiſes and Seſſions—Appeal of Murder—Bailing Felons by Juſtices of the Peace—Benefit of Clergy—Bargain and Sale—Of Uſes—Covenants to ſtand ſeiſed—Ejectione Firmæ—Actions of Aſſumpſit—The Chancery—Of Treaſon—Larceny—Sanctuary——King and Government--Printing of Law-Books—Miſcellaneous Facts. 131

CHAP. XXVIII.

HENRY VIII.

Of Judicature in Wales—and in Counties Palatine—Of Parliament—Of the Eccleſiaſtical Polity—Fees of Ordinaries—Reſidence and Pluralities—Submiſſion of the Clergy—Papal Authority aboliſhed—Marriage—Tythes —Of Precedence—The Poor Laws—Of Trade—Terms for Years.—Leaſes of Tenant in Tail—Gifts to ſuperſtitious Uſes—Deviſe of Land—Statute of Uſes—Jointures

tures—Statute of Wills—Statute of Bankrupts—Court of Wards and Liveries erected—Statute of Jeofail—Statute of Limitations—Trinity Term altered. 190

CHAP. XXIX.

HENRY VIII.

Many new Treaſons created—Treaſon by writing or ſpeaking—to diſobey the King's Proclamations—Statute of the Six Articles—Puniſhment of Poiſoning—Of Larceny—Servants embezzling Goods—Larceny in a Houſe—Law againſt Gypſies—Cheating by falſe Tokens—Gaming—Trial of Treaſon committed in Wales—and committed out of the Realm—Trial of Piracy—Trial of Bloodſhed in the Palace—The Benefit of Clergy taken away—The Queſtion of Clergy debated before the Council—The King's Determination—Abjuration and Sanctuary—Clergy again taken from certain Offenders—Sanctuary taken from certain Offenders. 271

CHAP. XXX.

HENRY VIII.

Leaſes for Years and at Will—Leaſes by Tenant for Life, &c.—Of Fines—Manner of ſuffering Recoveries—Uſes—A Uſe in Tail—Operation of the Statute of Uſes—Covenants to raiſe a Uſe—A Leaſe and Releaſe——Conſtruction of Wills—The Court of Chancery—Court of Requeſts—Preſident and Council of the North—Action of Covenant—Of Aſſumpſit againſt Executors—Of Trover—Debt and Accompt—The Criminal Law—Of Trials in two Counties—The Eccleſiaſtical Court—King and Government—Bills of Attainder—Torture—Of the Statutes—Of the Year-books—Fitzherbert—Saint Germain—Raſtell—Printing of Law-Books—The Regiſter—Miſcellaneous Facts. 323

CONTENTS.

CHAP. XXXI.

EDWARD VI.

PHILIP and MARY.

The Reformation eſtabliſhed—Act of Uniformity—The Roman Catholic Religion re-eſtabliſhed—and the Papal Authority—The Royal Authority of a Queen—The Poor Laws—Tipling and Gaming-Houſes—Payment of Tythes—Traverſe of Offices—Sale of Horſes—Adminiſtration of Juſtice—Criminal Law—Repeal of Treaſons and Felonies—Houſe-breaking—Offences againſt the Common-Prayer—Unlawful Aſſemblies—Robbing in a Booth or Tent—Of the Revivor of Stat. 25 Hen. VIII. c. 3.—Trial of Felons in Foreign Counties—Clerks Convict—Repeal of Treaſon, Felonies, and Præmunire—Riotous Aſſemblies—Puniſhment of Gypſies—Stealing of Women—Of Bail—Of Witneſſes in Treaſon. 436

CHAP. XXXII.

EDWARD VI.

PHILIP and MARY.

Aſſignees of Reverſions—Conditions and Limitations—Of Feoffees to an Uſe—Covenants to raiſe Uſes—Origin of Truſts—Whether Remitter by an Uſe—What Jointures will bar Dower—Aſſumpſit againſt Executors—Witneſſes in Treaſon—Diſtinction between Murder and Manſlaughter—Burglary to be by Night—Trial of Principal and Acceſſary—Reformation of the Eccleſiaſtical Law—Of Marriage—Of Wills—King and Government—New Commiſſions—Trial of the Duke of Somerſet—Of Sir Nicholas Throckmorton—Bills of Attainder—Judicial Proceedings on Account of Religion—Staunforde—Printing of Law-Books—Miſcellaneous Facts. 507

HISTORY

OF THE

ENGLISH LAW.

CHAP. XXIV.

HENRY VI. EDWARD IV. 1422-1483

Of the Canon Law—Of Biſhops—Officials—Of Things—Of Offences—Of Proceedings in Civil Suits—The Libel—Litis Conteſtatio—Dilationes—Miſſio in Bona—Of Sequeſtration—Of Proof—Of Witneſſes—Of Exceptions—Appeals—Of Proceedings in Criminal Suits—Accuſation—Inquiſition—Denunciation—Purgation—Excommunication—Interdict—Suſpenſion.

WE cannot diſmiſs the reigns of theſe two kings, without introducing the reader to ſome ſlight acquaintance with the law and practice of our eccleſiaſtical courts. We are aware, that ſuch an undertaking muſt be attended with ſome difficulty and hazard; and that, in attempting it, we ſhall deviate from the line that has been invariably purſued by writers on the law of England. All writers upon our law, from Bracton down to Blackſtone, have calculated their performances for the practicers in the courts of common law, and have accordingly taken no other notice of the clerical courts, than as their juriſdiction had, at various times, interfered with that of the

CHAP. XXIV. HENRY VI. EDW. IV.

temporal courts. Without diſputing the propriety of ſuch writers circumſcribing their enquiries, the juridical hiſtorian may be allowed to carry his views a little further. Conſidering the eccleſiaſtical courts as employed in the adminiſtration of juſtice equally with the temporal, he will eſteem the law of each to conſtitute only different parts of the *Engliſh Law*, and to demand a proportioned ſhare of his attention. The progreſs of our hiſtorical enquiry makes it now neceſſary to turn our thoughts with more earneſtneſs to this part of our ſubject. We are approaching the reign of Henry VIII. in which many parliamentary regulations were made for reforming our eccleſiaſtical polity, and queſtions of a ſerious nature with regard to the proceedings of the clerical courts were brought forward and diſcuſſed with great heat during that reign, and thoſe which immediately ſucceeded it. It would therefore be proper, conformably with the method which has hitherto been purſued, not to carry on the reader to ſo important a criſis in the hiſtory of our eccleſiaſtical courts, without previouſly poſſeſſing him of ſuch leading circumſtances in the form and conduct of that judicature, as will enable him eaſily to apprehend the effect of ſuch alterations, and the ſcope of ſuch controverſies.

THE preſent ſeems more particularly marked as the period for enlarging on this branch of our enquiry, by the appearance of our famous canoniſt Lyndwode. Whatever doubts might hitherto have exiſted concerning the nature of the juriſprudence which prevailed in the clerical courts, they ſeem all removed by the works of this author. In the *Provinciale*, and the Gloſs upon it, we not only have a view of ſuch conſtitutions as were made in this kingdom, with the interpretation put on them by that experienced practicer and judge; but we collect from him, that the oracle to which recourſe was had in all caſes where our conſtitutions were defective or doubtful, was the body of pontifical canon law. Thus are we enabled to ſay,

upon

CHAP. XXIV. HENRY VI. EDW. IV.

upon inconteſtable authority, *what* the eccleſiaſtical law of England was in the reigns of Henry VI. and Edward IV. and for many years after. Inſtead therefore of dwelling on the boundaries between the temporal and eccleſiaſtical juriſdictions, the *debatable ground* which we have fought over ſo often in the former parts of this Hiſtory, we ſhall now paſs the borders, and explore this obſcure region of eccleſiaſtical juriſprudence.

But before we proceed to examine the nature and extent of our national eccleſiaſtical law, it will be proper to take a ſhort view of the canon law, which was the original our doctors copied in every improvement they made in the law and practice of their courts. The underſtanding of that ſyſtem appears to be the beſt introduction to a knowledge of our own.

Of the canon law.

The canoniſts, in imitation of the Roman lawyers, and as the ſubject naturally dictates, divided the canon law into ſuch as regarded the rights of perſons and of things, the proceeding in civil ſuits, and the proſecution of crimes. The rights of perſons, as they preſented themſelves to the mind of a canoniſt, were confined to their clerical character and function. The duty, rank, and privileges of all perſons, from the pope and biſhops down to thoſe in the moſt inferior ſituations in the church, conſtituted this part of the canonical juriſprudence. Without entering minutely into this enquiry, we may content ourſelves with a ſhort ſtatement of the gradation of perſons who filled the clerical ſtate, and who having been mentioned frequently in the courſe of this work, ought to be better diſcriminated than they have yet been. The whole people of the country being divided into lay and eccleſiaſtical perſons, or clerks, they ſubdivided clerks as follows: into thoſe who were *in ſacerdotio*, thoſe who were *in ſacris*, and thoſe who were *nec in ſacerdotio nec in ſacris*. Thoſe *in ſacerdotio* were divided into ſuch as were *in altiori gradu, ſeu ordine*; and thoſe *in inferiori*: in the former

CHAP. XXIV. HENRY VI. EDW. IV.

were biſhops, archdeacons, and archpreſbyters; in the latter were preſbyters or prieſts.

Of biſhops.

A BISHOP, ſimply ſo called, preſided over a ſingle city with a dioceſe: a *metropolitan* (ſometimes called an archbiſhop) preſided over a province containing ſeveral cities. An archbiſhop, or primate, was a biſhop to whom the metropolitan and the other biſhops of the province were ſubject: theſe latter were in ſome places called patriarchs. The pope was reckoned among the order of biſhops, with a ſupreme authority over them all. The *cardinals*, from whom the pope was elected, were conſidered as his ſenators, and conſtituting, as it were, the *ſenatus eccleſiæ*: ſome were cardinal deacons, others cardinal prieſts, others cardinal biſhops; but each cardinal had nearly an epiſcopal juriſdiction [a].

ALL biſhops had an ordinary juriſdiction, which was of three ſorts. One was *jure ordinis*; as the conſecration of churches and altars, and the ablution and purgation of them after pollution; the making of the chriſm, and the ordination of clerks. The ſecond was *lege juriſdictionis*; as the power of correcting, collating, excommunicating, inſtituting; taking cogniſance of and hearing cauſes eccleſiaſtical. The third was *legè diœceſanâ*; as the right of exacting procuration; the *jus cathedraticum ſive ſynodaticum*; and the right of exacting and receiving penſions and tythes. All theſe powers could be exerciſed only in the biſhop's own dioceſe, over thoſe immediately ſubject to him; and that in perſon, or by proxy. Thus, too, an archbiſhop's authority went no further than his ſuffragans, and not to the ſubjects of his ſuffragans, except in a few caſes; nor could a patriarch interfere in the cauſes of thoſe who were ſubject to a biſhop or archbiſhop, unleſs by ſome cuſtom, or upon appeal. But the Roman pontiff alone could ex-

[a] Corv. Jus Can. 5, 6, 7. Launc. Inſt. Jur. Can. lib. 1. tit. 4.

erciſe

ercise episcopal jurisdiction over all churches and all christian men, either at Rome or elsewhere.

To ease the bishop in the discharge of his pastoral care, certain persons used to be appointed; some of them in the church, as *an archdeacon* and *archpresbyter*; some of them *extra ordinem*, upon particular emergencies, as a *coadjutor* or *vicar*. An archdeacon was, by his office, next to the bishop, and took upon him the whole care and duty of the bishop *tam in clericis quàm in ecclesiis*, having the whole episcopal cognisance and ordinary jurisdiction[b]. An archpresbyter, or chief-priest, was more exalted than other priests, and was vicegerent to the bishop *in spiritualibus*. He was either *urbanus*, discharging his duty at home in the cathedral church; or *rural*, doing the like duty at a distance: the latter was sometimes called a *decanus*, or *dean*, because he presided over *ten* clerks living in the country. He had the charge of all lay persons and priests who had churches within his deanery, and gave notice to the bishop of heavy offences. Archpresbyters had only a voluntary and not a contentious jurisdiction[c]. A *coadjutor* was occasionally appointed to be vicegerent to a bishop or an archdeacon, in case of sickness or any other impediment: the bishop chose such a person by the advice of his chapter. Bishops also, and other clerks, might chuse a vicegerent under the denomination of *vicar*, to act for them in any emergency; and might assign him a portion of their church or benefice, as a reward for his trouble. Such persons were appointed either to do divine service, and then they retained the name of vicar; or they were appointed *ad jurisdictionem exercendam*, and then they were called *officials*, and *missi dominici*. The former kind were the vicars which have been before mentioned in the reign of Henry IV*.

Officials.

The latter had the power of administering spirituals as well as temporals: thus they might excommunicate, sus-

[b] Corv. Jus Can. 26, 27, 28.
[c] Ibid. 29, 30.
* Vid. ant. vol. III. 222.

pend,

CHAP. XXIV. HENRY VI. EDW. IV.

pend, interdict, collate, inſtitute, confirm, elect, preſent, viſit, correct, puniſh, diſpenſe, and the like. Their juriſdiction was not deemed a delegated one, but ordinary, and the ſame as that of the biſhop; ſo that an appeal did not lie from the ſentence of the vicar to the biſhop, but to the archbiſhop; tho' from the archdeacon, and other inferior prelates, the appeal was to the biſhop. This, however, was to be underſtood of *officials principal*, who were conſtituted by the biſhop in his court by a general commiſſion of his office; not ſuch as were appointed for ſome part of a dioceſe, who were called *foranei*. Theſe latter had a different juriſdiction from that of the biſhop, and an appeal lay from them to the biſhop's conſiſtory. It was a rule, that a vicar could not ſubſtitute another vicar in his place [d].

HAVING ſaid thus much on the vicars appointed by biſhops, we ſhould add a word reſpecting thoſe who received a vicarial authority from the pope: theſe were called legates, and were either *legati à latere*, *legati miſſi*, or *legati nati*. The former were cardinals taken, as it were, from the ſide of the pope and his ſenate, who were ſent in his name into diſtant provinces; the ſecond were perſons ſent with like authority, not being cardinals; the laſt were ſuch as had this power by reaſon of a certain privilege or benefice. Theſe vicars carried with them all the pope's authority to hear all cauſes as *judices ordinarii*; but a certain eminence was always attributed to the legate *à latere* [e].

BISHOPS were *ſacerdotes* in the higher order: we now come to thoſe in the inferior, which were *preſbyteri*, or prieſts. Next to theſe come clerks that were not *in ſacerdotio*, but yet were *in ſacris*; as *deacons* and *ſubdeacons*, who were ſometimes, tho' improperly, called prieſts; for prieſts, ſtrictly ſpeaking, were thoſe only, who, in the

[d] *Vicarius non habet vicarium.* Corv. Jus Can. 31, 32.

[e] Ibid. 34, 35.

language

language of the canons, could perform the ſacrifice of the body and blood of our Lord. The deacons, conſiſtently with the original term [f], were to attend upon and aſſiſt the biſhop and prieſt in performing the divine ſervice; and the ſubdeacon was a ſubordinate aſſiſtant [g]. After theſe followed what the canoniſts called the *leſſer orders*, containing thoſe perſons who were *nec in ſacerdotio, nec in ſacris*. Theſe were ordained without the ſacramental unction, ſolely by the biſhop's benediction, with a certain diſtribution either of veſſels or veſtments, and they underwent the *prima tonſura*. They were called either *pſalmiſtæ, oſtiarii, lectores, exorciſtæ*, or *acolythi*. The duty of the firſt was to ſing; of the next, to keep the keys of the church; the next, as the name imports, were to read the ſcriptures in church; the next, according to the ſuperſtition of the times, were ſuppoſed to drive away evil ſpirits by certain deprecations and ſolemn prayers; and the laſt prepared the wax-lights, and the like.

It was the privilege of all theſe orders, that no one ſhould lay violent hands upon ſuch as had received them, without incurring the penalty of excommunication, which could not be removed but by the pope, except in the article of death. Thoſe in the lower orders were allowed to contract matrimony, which thoſe in the ſuperior orders were not, under pain of being deprived of their benefices. The gradation in which theſe ſeveral orders were ranked by the canoniſts, was this: a biſhop, a prieſt, deacon, ſubdeacon, pſalmiſt, acolyth, exorciſt, reader, oſtiarius; after theſe the canoniſts placed an abbot, and a monaſtic; for, ſay they, all monaſtics, if not clerks, are inferior to clerks [h]. The regulars, as they were exempted from epiſcopal juriſdiction, were not favoured by the clerical courts and the diſpenſers of juſtice there; and they are ſtudiouſly marked by the canoniſts as a diſtinct ſet of perſons not intitled to the privileges of clerks.

[f] Διακονοι [g] Corv. Jus Can. 37. [h] Ibid. 38. 39.

CHAP. XXIV. HENRY VI. EDW. IV.

NEXT to the rights of eccleſiaſtical perſons, the canoniſts proceed to conſider the rights of eccleſiaſtical things. Theſe they divided into *ſpiritual* and *temporal*. The former were ſo called, becauſe inſtituted *animæ cauſâ*, for the good of men's ſouls; ſome of them were corporeal, as the ſacraments; others, *res ſacræ et ſanctæ*; and others, *res religioſæ*.

THE ſacraments in the Romiſh church were ſeven: baptiſm, confirmation, the euchariſt, penance, ſacred orders, matrimony, and extreme unction. *Res ſacræ et ſanctæ* were churches, altars, the reliques of ſaints, veſſels, and veſtments. *Res religioſæ* were religious houſes; hoſpitals for the reception of ſtrangers, orphans, ſick and aged; churchyards, and ſepulchres. Such were ſpiritual things of a corporeal nature. Thoſe of an incorporeal kind were ſuch as conſiſted *in jure*; as a prebend, a right of patronage, annual penſions called *cenſus*, and what was nearly allied to them, exaction, procuration, and the canonical portion: theſe conſtituted the whole of what the canoniſts conſidered as ſpiritual things, whether corporeal, or incorporeal. Next to theſe followed three ſubjects of a mixed nature between ſpiritual and temporal; as tithes, firſt fruits and oblations; which were conſidered as mixed, becauſe, according to the canoniſts, the right to them was *jure divino*, while the fruit of ſuch right was temporal. Under the title of *res eccleſiæ temporales*, the canoniſts reckoned the alienation of church property, and the modes in which it could be made. Next to church property, the canoniſts conſidered the *peculium clericorum*, and how they might diſpoſe of it by will [i].

THE next object that came under the contemplation of the canoniſts, was the mode of proceeding in court, which they intitled *de judiciis*. Concerning this we ſhall have oc-

[i] Corv. Jus Can. 57 to 164. Launc. Inſt. Jur. Can. lib. 2. *per totum*.

caſion

caſion to ſpeak ſo particularly hereafter, that nothing need be ſaid on it at preſent; but we ſhall proceed to the fourth object of enquiry in the canon law, which is the nature of crimes. The canoniſts divided crimes into ſuch as were comprehended in the firſt and in the ſecond table of the Moſaical law. Without any obſervation upon this arrangement, we ſhall take a curſory view of crimes, as diſcourſed on in this clerical ſyſtem of penal juriſprudence.

Of offences.

THEY began with ſimony, which, by a very large definition, was when any thing was either given or promiſed for ſpiritual things, or for temporal things annexed to ſpiritual ones, as a prebend. Next to this were the crimes of Judaiſm, Saraceniſm, hereſy, ſchiſm, apoſtacy; then homicide, which they divided into parricide and ſimple homicide; under which they conſidered thoſe exerciſes or competitions that had a tendency to produce homicide, as tournaments, duels, and the art of ſhooting, all which were forbid under eccleſiaſtical penalties; the crime of adultery, *ſtuprum*, inceſt, rape, ſimple fornication, and ſodomy; theft, *rapina*, or robbery, burning, ſacrilege. Next to robbery and theft, the canoniſts choſe to rank uſury, as an offence, ſay they, of a ſimilar nature; then the *crimen falſi*; then *ſortilegium*, *calumnia*, colluſion. After theſe they placed ſuch as were offences only in clerks. If a clerk indulged himſelf in the noiſy amuſement of hunting; if he ſtruck any one; if he ſpoke ill of any one; if he adminiſtered to a perſon excommunicated, depoſed, or interdicted; if a perſon officiated as clerk not being ordained; if a clerk did not obſerve the regular gradation of orders, as if he was made a deacon before he had been a ſubdeacon, or a prieſt before a deacon; if he took more orders than one at a time, or took orders by ſtealth, without undergoing an examination of his qualifications; all theſe were offences puniſhable by the canon law. To theſe may be added all diſorders and irregularities whatſoever

CHAP. XXIV. HENRY VI. EDW. IV.

ſoever committed by clerks in the diſcharge of their duty [k]. The manner in which all canonical crimes were to be proſecuted, was the next point conſidered by the writers on the canon law.

WE have given the ſketch of the canon law in a curſory way for two reaſons: firſt, becauſe many objects of judicature which the canoniſts claimed, made no part of the eccleſiaſtical law in this country: ſecondly, becauſe others, which were admitted to belong to our courts, received, notwithſtanding, ſome alteration from our national conſtitutions or cuſtoms. What ſuch alterations were, and what conſtituted objects of juriſdiction in our ſpiritual courts, will be conſidered in the next chapter. For the preſent we ſhall be employed on a part of the canon law, which being adopted in our courts with leſs reſerve, demands a more minute conſideration than any other. This is the courſe of judicial proceedings, whether civil or criminal.

Of proceedings in civil ſuits.

THE cogniſance of cauſes, or, as the canoniſts called it, *judicium*, was divided into *ordinary* and *extraordinary*, or *ſummary*. The former was, when all the ſolemn forms of proceeding were obſerved by a libel, conteſtation of ſuit, and the other ſteps which will be mentioned preſently. The extraordinary, or ſummary, was, when the ſolemn forms were diſpenſed with, and they proceeded *ex officio judicis*, either by inquiſition, denunciation, or ſome other courſe *de plano*, as they termed it, upon general principles of equity. Another diviſion correſponded with that of the temporal juriſdiction, into *civil* and *criminal*.

JUDGES, in like manner, were conſidered by the canoniſts in two lights, ordinary and extraordinary. Of the former deſcription were archbiſhops, biſhops, legates, and others having authority from the pope. A biſhop might exerciſe his juriſdiction in any part of his dioceſe that was

[k] Corv. Jus Can. 287 to 344. Launc. Inſt. Jur. Can. lib. 4. tit. 3. uſq. ad tit. 10.

not

not exempt, either in perſon or by another, by hearing all eccleſiaſtical cauſes, and correcting all eccleſiaſtical perſons who offended. An archbiſhop had juriſdiction over his ſuffragans, but not over the perſons within the dioceſes of his ſuffragrans, unleſs in ſome ſpecial caſes that were exempted. An extraordinary judge was an *arbiter* choſen by the parties; or a *delegate* who received commiſſion from ſome ſuperior to hear a particular cauſe. A judge might be delegated by an ordinary, or by a delegate of the pope; but the delegate of an ordinary could not delegate another, unleſs the original delegation had included all cauſes in general. It was not only the cogniſance of a cauſe generally, but any part of the proceeding that might be delegated: thus the beginning, as the citation, and *litis conteſtatio*, might be delegated to one; the middle, containing the remainder down to the definitive ſentence, to another; the definitive ſentence and execution to another [1].

In conſidering the nature of proceedings in the eccleſiaſtical court, we ſhall begin with civil cauſes, and with the ordinary juriſdiction. The commencement of a civil ſuit in the ordinary juriſdiction, conſiſted in the citation of the defendant, or *reus*. Citations were of different kinds; they were verbal or real. A verbal citation was either public or private. A public citation was by fixing up publicly the letters of citation, (which too was called *edictalis citatio*) or proclaiming them by the mouth of a crier, or by a bell or trumpet. A private citation was, when a perſon was cited by a meſſenger, the party, or a notary at his own houſe. It was called a real citation, if the perſon of the party was apprehended. The *citatio edictalis* was to be made uſe of only where a perſon could not be otherwiſe cited: as if it was unſafe to attempt to come to him, this citation was to be affixed in ſome place near the domicil of the party, ſo that he might be reaſonably ſuppoſed to have knowledge of it.

[1] Corv. Jus Can. 165 to 172.

To

CHAP. XXIV.
HENRY VI.
EDW. IV.

To conſtitute a legal citation, it was neceſſary that it ſhould be made at the command of the judge, by an apparitor, at the inſtance and requeſt of the ſuitor; without which no judge could cite a perſon in a private ſuit, tho' he might in a public one. All parties intereſted were to be cited, unleſs, indeed, they were perſons of dignity and rank; for ſuch were not to be cited, *niſi veniâ priùs impetratâ*, under a heavy penalty. A citation iſſued not only at the opening of the ſuit, but in the various ſtages of the cauſe, wherever any *cognitio* was to be made to expedite it. Every citation was to contain certain formalities: it was to have the name of the judge, the *nomen* and *cognomen* of the party cited, and of him at whoſe ſuit it iſſued; the cauſe of citing, the place of judgment, the day and *terminus* for appearing. The place need only be mentioned in caſes where the judge was a delegate, becauſe the ordinary's court was certain and known. A citation was to be made either by three *edicta*, at the interval of ten days each, or by one peremptory edict, containing the ſame ſpace of time as the three *edicta*; and ſuch peremptory time was not to be ſhortened by the judge but for ſome ſpecial cauſe expreſſed in the citation.

If the party was regularly and lawfully cited, he ought to appear, otherwiſe he need not; but an irregular and unlawful citation would be cured by a voluntary appearance. Indeed the party's non-appearance would be juſtified in many caſes: as if he had been ſpoiled of the thing in queſtion, and was not firſt reſtored to it; if he was hindered by his adverſary; was cited to a higher tribunal; was detained by ſickneſs, or other like cauſe: but as ſoon as ſuch cauſe was removed, he was to preſent himſelf before the judge. As ſoon as a citation had iſſued and was ſerved, or the ſervice was prevented by the party himſelf who was cited, then the ſuit was conſidered in law as *lis pendens* [m].

[m] Corv. Jus Can. 172, &c.

It

It often happened that a cauſe once commenced, would go off upon an agreement between the parties: this was either by a *pactum* or a *tranſactio*, or by ſubmiſſion to an arbitrator. The two former, which may properly be conſidered as judicial agreements, were thus defined by the canoniſts: *Pactum*, ſay they, is *inter partes ex pace conveniens ſcripturâ, vel, ſine eâ, legibus ac moribus comprobata ſententia. Tranſactio* is defined, *rei dubiæ et litis incertæ, neq; finitæ, aliquo dato vel remiſſo, conventa deciſio* [n]. From the terms *ſententia* and *deciſio*, as well as from the occaſion on which the canoniſts mention theſe two agreements, they muſt be conſidered as having a ſort of judicial ſanction; and they naturally bring to the reader's mind the acount we have given of a fine, in the early parts of our Hiſtory [o]. A ſubmiſſion to arbitrators was another way of compromiſing the ſubject of a ſuit: while an arbitration was depending, the juriſdiction of the judge was held to be ſuſpended [p].

If the parties could not agree to compromiſe the matter in one of theſe three ways, they muſt reſort to the judgment of the court; in order to which it was uſual, firſt to appoint a *procurator*, or *proctor*, who was to act as attorney through the ſuit. Whether the appearance was by proctor or in perſon, the next ſtep was for the complainant to ſtate his cauſe of action. In ſummary cauſes, and ſome others, this might be done *vivâ voce*, without any writing, either by the advocate or in perſon; but in other cauſes it was to be done in writing, which was called *libellus*. A libel in civil cauſes was either *conventionalis*, or *poſtulatorius*; in criminal caſes, *accuſatorius*, or *querimonialis*. In the latter caſes, a libel was to contain the day and year, the *nomen* and *cognomen* of the accuſer and accuſed and of the judge, the crime, the time when it was committed, together with the *inſcription*, which will be explained here-

The libel.

[n] Corv. Jus Can. 181. 183.

[o] Vid. ant. vol. I. 148. This coincidence in the civil law (from which the canoniſts took it) has been noticed by Mr. Cruiſe, in his Eſſay on Fines.

[p] Corv. Jus. Can. 187. A ſubmiſſion to arbitrators is called by the canoniſts *compromiſſum*: hence our words compromiſe.

after.

CHAP. XXIV. HENRY VI. EDW. IV.

after. A conventional libel, in like manner, was to contain the names of the parties, of the judge, and of the thing in queſtion, with the quality of the action; though it was not indiſpenſably neceſſary that the name of the action ſhould be mentioned. The libel ſhould be tendered by the *actor* both to the judge and the *reus* [q]. If the *reus* made any anſwer, or denied a part, or the whole, this conſtituted a *litis conteſtatio*.

PERHAPS the *reus* would rather chuſe to meet the *actor* in ſome other way; for if he had any demand upon him, he might *reconvenire*, as they called it, that is, make a croſs demand upon him [r]. A *reconventio* was proper or improper: the former was ſuch as was inſtituted at the beginning of the original cauſe, and went on *pari paſſu* with it; the latter was ſuch as was made at any time before the concluſion of the cauſe. A *reconventio* was always to be before the ſame judge as the *conventio*, whether he was an ordinary or delegate; but not before an arbitrator, nor a judge of appeal: it might be had in all cauſes, except criminal, thoſe of ſpoliation, and ſome few others. The matter of the *reconventio* was to be put into a libel before the *litis conteſtatio*, or immediately after, and then would go on with the original ſuit: indeed they were conſidered as one ſuit only; for they had the ſame parties and judge: there was to be one ſentence; and if an appeal was prohibited in the firſt, it was prohibited in the ſecond alſo [s].

Litis conteſtatio.

WHEN the preparatory parts of the action were gone through, then followed the *litis conteſtatio*, which the canoniſts called *ipſius judicii principium et fundamentum*. It was truly the foundation of the judgment; for till that happened, there could be no examination of witneſſes, nor definitive ſentence; and the whole proceſs, of courſe, was

[q] Corv. Jus Can. 187, &c.

[r] *Reconventio* is defined by the canoniſts to be *mutua petitio contra convenientem vel agentem, in eodem judicio conſtituta.*

[s] Corv. Jus Can. 193. 194.

at

at a ſtand. The *litis conteſtatio* aroſe from the conflict between the intention of the *actor*, exhibited in his libel, and the anſwer of the *reus*, which ought always to be calculated to conteſt the matter there ſuggeſted. If the *reus* in his anſwer made a plain narration of a fact, not accompanied with a denial, there was no *litis conteſtatio*. A *litis conteſtatio* was regularly neceſſary in every cauſe that was conducted in the ordinary proceſs, and not *de plano*, without the figure and ſolemnity of judgment. The effect of the *litis conteſtatio* was various: it perpetuated the juriſdiction of the judge, and the action, if temporary; no innovation could be made to the prejudice of either litigant; it prevented a preſcription running; it made the matter in queſtion litigious; and the *actor* could not alter his libel [t].

NOTWITHSTANDING what has juſt been ſaid, there were ſome caſes in which witneſſes might be examined even before the *litis conteſtatio*. Thus, if there was any apprehenſion that a witneſs might die, or be long abſent, the judge, whether ordinary or delegate, might admit him to be examined; and this was done both in civil and criminal cauſes: in the latter, it was not allowed in the abſence of the other party; in the former, it was, if there was any danger in the delay; if not, the adverſe party ſhould be cited to ſee the witneſſes ſworn, and to tender interrogatories. Witneſſes might be examined thus prematurely in the following caſes: if it was a queſtion merely ſpiritual, and involving no benefit to any private perſon, as the crime of hereſy; if the public ſafety was endangered; if the ſtate of the church was concerned; in a cauſe of denunciation or of appeal; if the appellee was contumacious; in a matrimonial cauſe, if the other party was maliciouſly abſent; in a caſe of dilapidation or purgation; wherever any thing was to be done *ex officio judicis* in relation to an

[t] Corv. Jus Can. 195, 196, 197.

action,

CHAP. XXIV. HENRY. VI. EDW. IV.

action, as concerning coſts of ſuit; and in all caſes where the proceeding was ſimple, and *de plano*.

WITNESSES might be produced in this manner both by the *actor* or *reus*, though under different conſiderations. The *actor* might examine if they were old or infirm, and he was not at liberty to bring his action juſt at that time, as where a debt was due on a condition not yet broken. The judge was to decide as to the age, infirmity, or abſence of the witneſſes. When the witneſſes were ſo received, the actor was to bring his action within a year from the time at which he was intitled to an action, or at leaſt denounce to the *reus* the receipt of the witneſſes. A *reus*, without any ſuggeſtion of age, infirmity, or abſence, might indifferently produce any witneſſes, provided he had a ground of exception, which, though not ſufficient to found an action, might be enough to bar the action he apprehended. Witneſſes examined in this way were to be produced before the judge who was competent to the principal cauſe; the other party, as was before ſaid, ſhould be cited, unleſs the ſpeedy death of the witneſs was apprehended; and then it might be, not only in the abſence of the other party, but before a judge who was not competent to hear the principal cauſe [u].

AFTER the conteſtation of ſuit, there were ſeveral ſteps to be taken before the definitive ſentence could paſs. Theſe may be conſidered as of three kinds: firſt, the *juramentum calumniæ*; ſecondly, the *dilationes*; thirdly, the proceſs againſt the *reus*. The *juramentum calumniæ*, or oath of calumny, was taken by both the parties litigant, who reſpectively ſwore, that the cauſe was commenced, and ſhould be carried on and defended, *bonâ fide*, for the ſake of juſtice, and with no malicious deſign. The judge could not impoſe this oath but at the deſire of the other party; and ſhould either refuſe, the conſequence was

[u] Corv. Jus Can. 197, 198, 199.

fatal;

fatal; for the *actor* would loſe his action, the *reus* the thing in queſtion, as if he had confeſſed the demand. All litigants were liable to take this oath, and they might take it themſelves, or by their proctors; but a proctor to take this oath ſhould have a ſpecial warrant, and then he might ſwear, as the canoniſts expreſſed it, *tam in animam domini quàm ſuam.* It was to be taken in all cauſes where any proof was to be made, whether in a criminal or civil ſuit. Beſides ſwearing to the juſtice of their cauſe, they were alſo to ſwear that they had not given, nor would give, any thing to the judges or others, except the honorary rewards to the advocates, and the like lawful preſents; and alſo that they would not require any proof which they did not think abſolutely neceſſary[x].

THE *dilationes*, or allowances of time for the performance of any judicial act, were termed either *legales* or *arbitrariæ*; the former being ſuch as were aſcertained by law; the latter being dependent on the pleaſure of the judge, who made them longer or ſhorter according to the nature of the caſe, and the circumſtances of the parties. Theſe latter dilations were to be given by the judge ſitting on the bench, in the preſence of both parties; to the former the parties were intitled of courſe, tho' they might be qualified by the diſcretion of the judge. The uſual occaſions on which one or other of them were allowed, was for producing witneſſes, for proving inſtruments, for purgation, for conteſtation of ſuit, and the like[y].

SOME other circumſtances were conſidered as ſpecies of dilations. Among theſe were *feriæ*, or ſuch days as were always exempt from judicial proceedings of every kind; and the *ordo judiciorum*, by which the due courſe of hearing each cauſe was preſcribed. Thus a principal cauſe was to be heard before one that was only incidental to it; a criminal cauſe was to be heard before a civil one[z]. A

[x] Corv. Jus Can. 199, 200. [y] Ibid. 201. [z] Ibid. 205.

CHAP. XXIV.
HENRY VI.
EDW. IV.

plus petitio, as they called it, might be reckoned among the *dilationes*: this was when the *actor* demanded more than he was by law intitled to; in which caſe he loſt his action, and paid ſingle, double, or treble coſts, according to the nature of the exceſs in the demand [a].

ONE inſtance of the *ordo judiciorum* was, when a *petitory* (or, as we ſhould ſay in Engliſh, an action upon the right) and a poſſeſſory cauſe concurred. Thus the *actor* going on ina *petitory* way, and the *reus* complaining, perhaps, of a ſpoliation, made a croſs demand of a poſſeſſory nature, whether of the ſame thing, or of ſome other. If it was of the ſame thing, the poſſeſſory queſtion was firſt to be determined; and that upon the right, though firſt brought, was to be ſuſpended. If it was for a different thing, there was a diſtinction; for the poſſeſſory demand might be made either by way of reconvention, by way of action, or by way of exception: if in the firſt, then the two queſtions went on together, and there was only one ſentence, as was obſerved before: if in the ſecond way, then the poſſeſſory queſtion was firſt to be determined, whether the perſon ſpoiled was ſued civilly or criminally by the *actor*; for it was a rule, *ſpoliatus ante omnia eſt reſtituendus*: if in the latter way, the exception of ſpoliation was to be firſt decided, and then that upon the right. The perſon who ſued for the right was at liberty, before the concluſion of the cauſe, to ſue for the poſſeſſion; though not after, unleſs for ſome ſpecial cauſe. If a perſon ſued at once both for the right and poſſeſſion, they were both determined by one ſentence; and the perſon who loſt upon the poſſeſſion, might afterwards go upon the right [b].

A SPOLIATION was defined to be *violenta poſſeſſionis privatio*. It might happen both with reſpect to moveable and immoveable things; to rights, and to benefices. If a judge unlawfully deprived any one of his right by judg-

[a] Corv. Jus Can, 206. [b] Ibid. 207.

ment,

ment, it was conſtrued a ſpoliation. A perſon who commanded a ſpoliation to be made, or who acknowledged it to be made in his name, or who received the thing from the ſpoiler, was held the ſame as the ſpoiler. A perſon ſpoiled might complain either by action, reconvention, or exception: in the firſt caſe, he was to be firſt reſtored; in the ſecond, both queſtions were to be heard *pari paſſu*; in the third, he need not anſwer till he was reſtored. A reſtitution, if made, was to be with the fruits, and the loſs ſuſtained [c].

The next conſideration is the proceſs which iſſued againſt thoſe who were contumacious. A perſon who was lawfully cited, and, being under no lawful impediment, did not appear in perſon, or by a proctor; or if he appeared, but did not conform himſelf, or departed without the judge's leave, in all theſe caſes ſuch perſon was held contumacious. A lawful citation (as has been ſhewn) was by three *edicta*, or one peremptory, containing the ſame ſpace of time as the three edicts. The contumacy, whether of the *reus* or *actor*, (for he alſo might be contumacious) was puniſhed differently, and according as there was a *litis conteſtatio* or not; and the judge need not inflict all the penalties at once, but one after another, as the party appeared leſs likely to ſubmit himſelf.

If the *actor* did not appear at the time to which he had cited the *reus*, he was to pay coſts to him, and could not have a new citation, without giving ſecurity for his own appearance at the new-appointed time. The *reus* alſo, if there had yet been no *litis conteſtatio*, might require that the *actor* ſhould be cited; and if he did not then appear, that he himſelf might be admitted to make proof, and ſentence be paſſed. If the *actor* was contumaciouſly abſent after the *litis conteſtatio*, and all but ſix months of the *tempus inſtantiæ* (which was uſually three years) was elapſed,

[c] Corv. Jus Can. 208. Launc. Inſt. Jur. Canon. lib. 3. tit. 10.

CHAP. XXIV. HENRY VI. EDW. IV.

the judge, if the caſe was a plain one, might proceed to a definitive ſentence, even in favor of the *actor*, provided the right was on his ſide; otherwiſe in favour of the *reus*, by abſolving him, and condemning the *actor* in coſts.

If the *reus* was contumacious, either a mulct was inflicted on him by the judge, or he was condemned to pay the *actor* his coſts and other damages; or he was excommunicated, or ſuffered a *miſſio in bona*. A *reus*, if contumacious, was ſometimes ſaid to be *verus*, and ſometimes *fictus*: the firſt was one who being perſonally cited, or by three edicts, did not appear; or appearing, would not anſwer: the latter was one who had been only cited at his houſe; unleſs, indeed, the citation had been communicated to him by his friends or domeſtics[d]: and there was this difference between the two, that the latter might appeal, but the former could not.

Miſſio in bona.

The *miſſio in bona* was different where there had been a *litis conteſtatio*, and where not. After the conteſtation, if the judge was not clear in the juſtice of the cauſe, he put the party into poſſeſſion of the goods of the *reus*, ſo as to make him only the real and true *poſſeſſor* thereof, leaving to the abſent *reus* to maintain a queſtion upon the *right*. If the cauſe was a plain one, then he paſſed a definitive ſentence. If there had been no conteſtation, as he could not properly come to the merits of the cauſe, there was only a ſimple *miſſio in bona*, which was done by means of a *decretum*. There was a firſt and a ſecond *decretum*: by the firſt there was *miſſio in poſſeſſionem bonorum*, merely for cuſtody. This proceſs might be had by all perſons to whom there was an abſolute debt due, not by thoſe who had a debt only *ſub conditione*: unleſs, indeed, where the party was a legatee. The *miſſio* was firſt into poſſeſſion of moveables, then of immoveables, and laſtly of incorporeal things. There was, however, a difference between a real and perſonal action. In a real action the *miſſio* was *in bona petita*, of which the party became the true *poſ-*

[d] Corv. Jus Can. 209, 210, 211.

ſeſſor,

ſeſſor, and after a year, and not before, he might take the fruits: within the year, the *reus*, if he purged himſelf, might come, and on giving ſecurity to ſtand to the ſuit, and paying the coſts, he would have reſtitution of the goods taken. In a perſonal action, the *miſſio* was in proportion to the debt, and the *actor* did not obtain poſſeſſion, but only held it, together with the owner, in a ſort of cuſtody. The *reus*, whenever he appeared, ſo as it was before the ſecond *decretum*, was to have reſtitution, upon giving ſecurity to ſtand to the ſuit, and refunding the coſts.

THE ſecond *decretum* was not neceſſary for requiring poſſeſſion in a real action, for that we have ſeen was done by the firſt, but it was neceſſary in a perſonal one; for by means of this, after the *reus* perſiſted in his contumacy, the *actor* was put into poſſeſſion, ſo as to continue the true and unchangeable owner of the thing ſo taken. This did not iſſue till a year after the firſt *decretum*, and was at the prayer of the party. As in the former caſe, ſo here, reſtitution would be made if the party appeared, or gave ſecurity for ſtanding to the ſuit, and paid the coſts; or indeed if any juſt impediment could be ſhewn to have prevented his coming. It ſeems to have been left to the diſcretion of the judge, in what manner he would order the things taken under a *decretum*. Thus, he might either order them to be ſold, or to be delivered in payment of the demand; if a debt, he might either make the *actor* real proprietor of them, or give him only poſſeſſion. The proceſs of *miſſio in poſſeſſionem* was allowed only in profane matters, not in caſes where any dignity or benefice, or other eccleſiaſtical matter was in litigation; for then, inſtead of this proceſs, they either proceeded to a definitive ſentence, or the contumacious party was purſued by eccleſiaſtical cenſures[e]. It is for the reader to judge whether the framers of our real proceſs by caption, as related in the early parts of this Hiſtory, had any eye to this canonical proceeding*.

[e] Corv. Jus Can. 211, 212, &c. Launc. Inſt. Jur. Can. lib. 3. tit. 6.

* Vid. ant. vol. I. 417, 418, &c.

ANOTHER

CHAP. XXIV.
HENRY VI.
EDW. IV.

ANOTHER way of proceeding in cases of contumacy, was by *sequestration*. This was depositing the thing in question, or the fruits of it, by consent of the parties, or by the authority of the judge, in the hands of a sequestrator, for safe custody, to be restored to the successful party in the suit; so that it was either *conventional* or *judicial*. That a person might not be deprived of the possession rashly, which was like beginning with an execution, this was confined to particular cases. If the judge apprehended that the parties might come to open violence; if the person who was *missus in possessionem* by a *decretum* was wasting the fruits and produce, and the like, such was a proper occasion for a sequestration. Things, whether moveable or immoveable, were subject to sequestration; though it would not be allowed of a benefice, if any question arose against a person who had been full three years in possession.

A CONVENTIONAL sequestration passed into what they called a *sequestral possession*, unless there was an agreement that it should only be for safe custody: and if it did, the sequestrator had all the advantages of possession; that of taking the fruits and produce, of presenting to benefices, and the like. A judicial sequestration did not convey the *possession*, but that awaited the definitive sentence. Any person who hindered the sequestration of an ecclesiastical benefice, or the receiving the fruits of it, incurred excommunication, from which he could be absolved only by restitution; and if he was one of the parties, he would lose the benefice, and whatever right he had therein [f]. It should be observed, that the whole process for a *missio in possessionem*, and for sequestration, were exceptions to the rule, that *lite pendente nihil effet innovandum*, which was most rigidly adhered to in all other respects [g].

THUS far of the *reus*, when contumacious: the next considerations are when he came in and confessed, or denied

[f] Corv. Jus Can. 216, &c. [g] Ibid. 215.

the

the charge againſt him. A confeſſion conſiſted not only in a plain admiſſion of the charge, but might be collected from circumſtances, the ſtrongeſt of which was ſilence. If, on interrogation, he ſhould contumaciouſly refuſe to anſwer, or ſhould not deny the allegations of his adverſary, this amounted to a confeſſion. A confeſſion had the force of a ſentence; ſo as that the judge, if proceeding *de plano* without the form and ſolemnity of a judgment, need not paſs ſentence upon the perſon confeſſing; but if he was proceeding in the ordinary courſe, he muſt give ſentence: the ſame alſo in criminal matters[h].

Of proof.

If the *reus* denied the libel, then the *actor* was required to prove it. Proof was divided into artificial and inartificial: the former was ſuch as could be deduced by argument from the thing itſelf; the latter conſiſted in ſuch things as were out of the cauſe; as witneſſes, inſtruments, confeſſion, an oath, and the like. Proof was again conſidered in two lights; either as *plena*, or *ſemiplena*. The firſt was ſuch as wrought on the mind of the judge *plenam fidem*: ſuch was a proof by two witneſſes, by a public inſtrument, by preſumption, the judicial confeſſions of a party, the evidence of the thing. The latter was ſuch as had only an imperfect effect on the judge's mind, not producing ſuch a faith as he ought to acquieſce in; as by one unexceptionable witneſs, a private inſtrument, compariſon of hands, an extrajudicial confeſſion, argumentation, report, and the like. However, ſeveral half proofs might be ſo put together as to make one full proof; as where they tended to one end, and not to ſeveral; and this, whether they were of the ſame kind, as two witneſſes; or of different kinds, as one witneſs, and a report. But if theſe proofs went to different objects, as one witneſs to prove a report, another to prove a flight, it would not ſuffice; be-

[h] Corv. Jus Can. 218, &c.

cauſe,

CHAP. XXIV. HENRY VI. EDW. IV.

cauſe, to make a full proof, each ought to be proved by two witneſſes.

In ſome caſes, the canon law was content with ſomething leſs than proof, where a probable preſumption could be raiſed; as in a caſe of ſimony, which was always committed in ſecret. Proof conſiſted either in witneſſes, confeſſion, inſtruments executed with due ſolemnity, the evidence of the fact, report, antient books, and writing on ſtones or columns, letters under the ſeal of a biſhop, cardinal, abbot, or chapter, common opinion, *indicia indubitata*, violent preſumption. If the *actor* brought a full proof, he need not take an oath himſelf [i]. Two ſorts of proofs, that which conſiſted of witneſſes, and that which depended upon inſtruments, deſerve more particular conſideration: and firſt of witneſſes.

Of witneſſes.

The competency of witneſſes was meaſured by the canoniſts by much nicer conſiderations than any that operated in our law of evidence. The objections to a witneſs were ſuch as were abſolute, or ſuch as applied only between particular perſons. Of the former kinds were the following: that he was not arrived at puberty (unleſs indeed in caſes of læſe majeſty, where this was not an objection); that he was mad, or of non-ſane memory; an infamous perſon, as an uſurer, or one condemned by a public judgment; one who had been convicted of receiving money, either for giving or with-holding his evidence; one condemned either for peculation, for a libel, calumny, or adultery; a heretic (but this was no objection where he was to give evidence againſt a heretic); a perjured perſon; a woman who was or had been a common proſtitute; and all perſons who were ſtigmatized by the ſecular laws.

Between particular perſons, it was held that a domeſtic, a familiar friend, a relation by blood or marriage, one who could be influenced to be a partial witneſs; all

[i] Corv. Jus Can. 220, 221, &c.

theſe

theſe were prohibited from becoming witneſſes for any perſon towards whom they ſtood ſo circumſtanced, but not from giving evidence againſt him: nor were they prohibited from giving evidence in a cauſe for proving conſanguinity, or any matrimonial matter. On the other hand, a perſon who had confeſſed himſelf guilty of a crime, could not be witneſs againſt an accomplice, except in certain heinous and more ſecret offences; as læſe majeſty, hereſy, or ſimony: an enemy could not be permitted to be a witneſs againſt an enemy; a freedman againſt his patron; a ſon againſt a father, or a father againſt a ſon, unleſs in a matrimonial cauſe; nor a heretic or Jew againſt a chriſtian; nor a layman againſt a clerk in criminal cauſes. A woman could not be witneſs to a teſtament; nor in a criminal cauſe, if inſtituted criminally, tho' ſhe might if it was proſecuted civilly. No one could be witneſs in his own cauſe, nor could the advocate or proctor [k].

THE number of witneſſes ought at leaſt to be two, whether in a civil or criminal ſuit; nor, ſay the canoniſts, would leſs be received even from a perſon of dignity and rank. The latter were great conſiderations in the article of teſtimony: thus to convict a cardinal biſhop, ſeventy-two witneſſes were required; a cardinal preſbyter, forty-four; a cardinal deacon, twenty-four; a ſubdeacon, acolyth, exorciſt, reader, oſtiarius, ſeven; and yet, if the witneſſes were of known good life and converſation, two or three, it was thought, might ſuffice even in theſe caſes of ſuch prodigious caution. Yet in the purgation of a biſhop they invariably required twelve; of a preſbyter, ſeven; of a deacon, three: three witneſſes alſo were required to prove a will.

ALTHOUGH it was a general rule, that one witneſs, whatever was his dignity, could prove nothing; there were exceptions of caſes where he was allowed, if no prejudice could happen to any one: as when it was doubted, whe-

[k] Corv. Jus Can. 224, 225, 226.

ther

CHAP. XXIV. HENRY VI. EDW. IV.

ther a perſon was baptiſed, whether a church was conſecrated, and the like; when the will of a dumb or expiring perſon was to be proved; when a marriage was to be deſtroyed by pretext of conſanguinity; and, as was before mentioned, in caſe of læſe majeſty [l].

It was held, that a witneſs ſhould not offer himſelf voluntarily, but ſhould be called, and as it were, brought in againſt his will; and a perſon who came voluntarily, was conſidered as a ſuborned and ſuſpected perſon. He was to be produced and received after the conteſtation of ſuit, and not before, unleſs there was an apprehenſion of his death or abſence: or unleſs it was in a cauſe of matrimony or election, or in a proſecution by inquiſition or denunciation. The production ſhould be before the judge who took cogniſance of the cauſe, unleſs the witneſſes were infirm, old, debilitated, or very poor, ſo as not to be able to come to the place where the judge was, for then they might be examined by proper perſons who were to be appointed for that purpoſe [m].

Before the judge proceeded to the examination, he was to admoniſh the witneſſes of the heinouſneſs of perjury, and then require from them an oath. An oath was taken differently by different deſcriptions of perſons: thus, by the canon law, all ſeculars ſwore, *tactis ſacroſanctis ſcripturis*: all regulars ſwore, *propoſitis evangeliis, et manu ad pectus admotâ*. After the oath was taken, the judge was to examine the witneſs apart, without the preſence of the parties, or any one, except the notary who was to take down the examination. The queſtions were to be formed upon the articles exhibited by the adverſe party, and upon interrogatories or enquiries concerning the perſons of the witneſſes themſelves: they were to be aſked as to the occaſion of their knowledge, the time, place, and the like; to all which they were bound to anſwer [n].

[l] Corv. Jus Can. 227. [m] Ibid. 228. [n] Ibid. 229.

A wit-

A witneſs was not to depoſe upon his belief or hearſay, unleſs it was ſupported by ſomething that corroborated, or where it was in caſe of ſome antient right, and he ſpoke from the reports of old people.

After the depoſition was made, the judge was to read the whole, whether upon the articles or interrogatories, to the witneſs, that he might correct what he had ſaid, and then he was to diſmiſs him with ſtrict injunctions of ſilence. The judge was likewiſe to endeavour to prevail with the parties to renounce any further production of witneſſes; otherwiſe they might, within the time allowed by the judge for production, go on to a third production of witneſſes upon the ſame articles [o]: but they could not make a fourth, unleſs the party took an oath of calumny, ſwearing that he did not do it for vexation, and that he had not had a copy of the depoſitions; for when the depoſitions had been once publiſhed or known, there could be no further examination on thoſe articles, tho' there might on new ones.

When the depoſitions were publiſhed, a copy was to be given by the judge to the parties litigant, to make their exceptions if they choſe; which, however, was not to be done, unleſs they had proteſted, and made mention of ſuch an intention, either before or at the time of the publication. Such an exception was to be proved by witneſſes, who were called *teſtes reprobatorii*, or by inſtruments which might be reprobated, as they called it, by others; and beyond this there was no further vying and revying [p]. When the exception was proved, the judge was then to give ſentence according to the credibility of the evidence on both ſides. If they ſeemed to be on a balance, judgment was to be given for the *reus*, unleſs the ſide of the *actor* was ſuch as the law treated with peculiar favour; as a caſe of dower, of a teſtament, a pupil, widow, orphan,

[o] Corv. jus Can. 230. [p] Ibid. 231.

the

CHAP. XXIV. HENRY VI. EDW. IV.

the church, the *fiſcus*, legitimation, and ſome others [q]. If a witneſs would not readily attend, he might be compelled by the judge, unleſs he was privileged by ſome lawful excuſe: thus a perſon was not to be compelled to give teſtimony againſt a father-in-law or ſon-in-law, a ſtep-father or ſtep-ſon, a couſin-germain or counſin-germain's ſon, nor againſt any perſon ſtanding in the firſt degree of blood; not a freedman againſt his maſter; not a man aged and infirm; a ſoldier, one abſent upon any ſervice, a biſhop, a clerk, or other eccleſiaſtical perſon. Yet if the truth could not be made out in any other way, the above perſons might be compelled to give teſtimony; but no witneſs was obliged to attend, unleſs his expences were tendered him [r].

Of inſtruments.

THUS far of witneſſes: the next conſideration is the nature of *inſtruments*. Inſtruments were divided into public and private. Of the former kind were thoſe made by public perſons, as notaries; or under ſome public ſeal, as the ſeal of a biſhop, a chapter, a prince; or publiſhed by authority of a magiſtrate; ſuch as were ſubſcribed by the perſon making it, and by two witneſſes, ſo long as the witneſſes were alive; ſuch as were taken out of public archives. Private inſtruments were thoſe made by private perſons without witneſſes, as accounts, private remarks, letters, cautions, and the like [s]. Theſe of themſelves were not proofs, except againſt the perſon penning them, and not denying them, or the perſon accepting them; unleſs, indeed, they were confirmed by the ſubſcription of witneſſes, or the contracting parties, or by length of time, or ſome judicial recognition. Reſpecting public inſtruments, there was this difference: ſuch as were made before a judge amounted to full proof, and no proof to the contrary would be admitted; ſuch as were made by a notary alſo, if attended with all the due ſolem-

[q] Corv. Jus Can. 232. Launc. Inſt. Jur. Can. lib. 3. tit. 14.

[r] Corv. Jus Can. 232, 233.

[s] Ibid. 234.

nities,

nities, amounted to full proof; nevertheleſs, a proof to the contrary would in this caſe be admitted. The due ſolemnities were not the ſubſcription and ſubſigning of the contracting parties, and of witneſſes, but the name and ſeal of the notary, with the year, place, and ſo on[t]. Inſtruments, like witneſſes, were to be produced after the conteſtation of ſuit, and before the judge in the cauſe. If the *actor* was deficient in his proofs, it was ſometimes the practice to allow him to ſupply that deficiency by his oath.

WHEN the *intentio* of the *actor* was proved in one or other of theſe ways, the *reus* would be condemned, unleſs he could defend himſelf by ſome exception. Exceptions were divided into dilatory and peremptory: the former were either ſuch as were *declinatoriæ judicii*, or *dilatoriæ ſolutionis*. Declinatory pleas either went to the perſon of one of the parties, or the proctor, or the form of the action. Thoſe that were *dilatoriæ ſolutionis* were only to defer the claim, which was admitted to be due, but not demandable till a future day. Peremptory exceptions intirely did away the action; and they were divided into thoſe that were *peremptoriæ litis finitæ*, and thoſe *ſimpliciter peremptoriæ*: the former of theſe impeded the very commencement of the ſuit, and might be pleaded *ipſo judicii limine*: the latter did not impede the commencement of the ſuit, but might be pleaded after the conteſtation of ſuit in any ſtage before ſentence. Dilatory exceptions that were *declinatoriæ judicii*, were to be pleaded at the commencement of the ſuit; and, if omitted, could not be pleaded after: thoſe that were *dilatoriæ ſolutionis*, might be pleaded after the libel, before conteſtation, within the term aſſigned by the judge; and yet a dilatory plea might come after the conteſtation, in ſome particular caſes; as where the matter was new; or where, though it aroſe be-

Of exceptions.

[t] Corv. Jus. Can. 235.

fore,

CHAP. XXIV. HENRY VI. EDW. IV.

fore, it did not come to the knowledge of the perſon pleading it till after the conteſtation; if the judge had reſerved to the party ſuch a ground of exception; if it was excommunication. The judge had a diſcretion in appointing the time for propounding an exception. A perſon might have many exceptions, and thoſe contrary ones; and if the judge refuſed to admit them, the party might appeal.

NEXT to the exception came the replication; and there the parties ſtopped, at leaſt with reſpect to producing witneſſes; for to avoid the protracting of ſuits, it was a rule, *illos tertio refutare non licet*. A replication might be put in at any ſtage of the ſuit. As the *reus* was not called upon to prove his exception till the *actor* had proved his *intentio*, ſo he need not prove his replication till the other had proved his exception. The time for replying was in the diſcretion of the judge[u].

AFTER the pleading and proofs, the judge was to pronounce ſentence *ſecundum allegata et probata*. In order to this, the parties litigant were to be cited either by three common edicts, or one peremptory, containing the ſpace of three edicts. A ſentence, if paſſed legally, and no appeal made from it in ten days, was conſidered as *res judicata*[x]. Upon this execution followed. There was ſome difference in the ſuing of execution in a real and a perſonal action. In the former, it was to be made immediately upon the expiration of the ten days allowed for an appeal; in a perſonal one, not till the end of four months. The only execution allowed by this law, was by the ſpiritual arms which the church had aſſumed; by ſuſpenſion, depoſition, excommunication, or degradation. If ſuch eccleſiaſtical cenſures had not their effect, the ſecular arm was implored; and if the ſecular judge refuſed his aid, the church purſued him with excommunication[y].

[u] Corv. Jus Can. 249 to 256. Launc. Inſt. Jur. Canon. lib. 3. tit. 8.

[x] Corv. Jus Can. 263, 264.

[y] Ibid. 265, 266.

HAVING

HAVING led the reader through the whole courſe of proceeding in ordinary caſes, it follows that we ſhould conſider the nature of an appeal from a ſentence, and the execution thereof. An appeal might be either before or after definitive ſentence, and was always from an inferior to a ſuperior judge. An appeal before a definitive ſentence was from an interlocutory one, or any injury felt by the party; as if he was cited to an unſafe place, or at a ſhorter day than was cuſtomary[z]. For it was a rule in the canon law, that an appeal might be made from every *gravamen* by which a litigant felt himſelf injured; ſo that an appeal was conſidered as a ſpecies of defence for the protection of innocence in all caſes. An appeal after definitive ſentence might be either from the ſentence, or the execution of it, if it was unlawfully grievous. An appeal, however, did not lie for a perſon who was ſentenced for a real contumacy, or for a manifeſt crime; or for one who had confeſſed and was convicted upon ſuch confeſſion; nor for one who had bound himſelf by oath (as was not uncommon) to bring no appeal[a].

Appeals.

AN appeal was to be made *gradatim*, from an inferior to a ſuperior judge: thus from the ordinary of the biſhop to the biſhop himſelf; from the official-general of the biſhop, and from the biſhop, to the archbiſhop. But an appeal might be made to the pope, or his legate, *uno ſaltu*, without going through the intermediate gradations. Yet an appeal to the pope did not remove the cauſe to the court of Rome, but it was to be determined by delegation in the place where it aroſe; unleſs in ſome particular caſes, where the pope was ſatisfied that a delegation could not be made without a failure of juſtice. From the pope there was no appeal[b]. An appeal lay both in a civil and criminal cauſe, unleſs in ſome particular caſes where it was prohibited. Thus no appeal could be had ſo as to prevent the opening of a teſtament, and to reſtrain the heir from com-

[z] Corv. Jus. Can. 267.
[a] Ibid. 268.
[b] Corv. Jus Can. 269. Launc. Inſt. Jur. Can. lib. 3. tit. 17.

ing

CHAP. XXIV. HENRY VI. EDW. IV.

ing to his right; nor from an execution, unleſs, as was before ſaid, it was unlawful and grievous[c]; nor from the correction of regular diſcipline, unleſs that was made alſo unlawful and grievous; nor from a ſentence of interdict, and ſome others.

AN appeal might be made *inſtanter, vivâ voce,* by the word *appello,* before the judge left the bench, or within ten days after. If it was from an interlocutory ſentence, or any other *gravamen,* ſome reaſonable cauſe of appeal was to be alledged[d], and alſo that his exception was not admitted; if from a definitive ſentence, neither of them was neceſſary; but the party appealing might alledge before the appellate juriſdiction ſuch *gravamina* as he pleaſed, founded on matter not entered upon before the judge below, and he might produce freſh witneſſes, freſh inſtruments, and make proof of ſuch things as were not before proved: whereas the appellant, in the former caſe, was confined to the cauſe of appeal expreſſed, which was to be determined intirely on a view of the proceedings in the court below.

THE cauſe was diſmiſſed from the inferior to the appellate juriſdiction by *literæ dimiſſoriæ,* called likewiſe by the canoniſts *apoſtoli.* Theſe were to be ſued for by the appellant, at leaſt within thirty days from the paſſing of the ſentence[e]; and they were to be made by the judge below, and addreſſed to the judge before whom the appeal was depending. If they were not obtained within that time, or within a ſhorter, if ſo appointed by the judge, the appeal was conſidered as deſerted. If the judge refuſed the *apoſtoli,* an appeal would lie from ſuch refuſal; and if he did not appeal from the refuſal, ſuch acquieſcence would be conſtrued as a deſertion of the original appeal, and the ſentence would ſtand in force.

WHEN the *apoſtoli* were granted, the appeal was to be notified to the adverſe party, in order that he might appear

[c] Corv. Jus Can. 270. [d] Ibid. 271. [e] Ibid. 272.

before

before the new tribunal, and was to be preſented within a certain term, to the judge *ad quem*, otherwiſe the ſentence would ſtand in force. The term for preſenting was in ſome caſes fixed by law, and in ſome was preſcribed by the judge according to the circumſtances of the cauſe and the parties; the judge could not prolong a legal term, tho' he might ſhorten it [f]. After the preſentation was made, if the judge *ad quem* received the appeal, the appellant was to refer to the judge *a quo* the preſentation, together with *compulſoriales* and inhibitions, if he required them. The compulſorials were letters ſent by the judge *ad quem* to the judge *a quo*, requiring him to tranſmit to him, within a certain time, the proceedings in the cauſe, that the truth might be inquired into; which if he neglected, he might be compelled to do by penal mandates iſſued from the judge *ad quem*. An inhibition was a letter iſſued from the judge *ad quem* to the judge *a quo*, commanding him not to do any thing in the cauſe while the appeal depended; and whatever was done, either by the judge or party, pending the appeal, would be reſcinded as null and void, the office and power of the judge being ſuſpended, as far as concerned that cauſe; notwithſtanding which, he might yet interfere in ſome particular caſes. Thus if the thing in queſtion was in danger of being waſted by the appellant, the judge might cauſe it to be ſequeſtered [g]; and other things might be done by the judge, if they did not prejudice the appeal. If the appellant deſerted his appeal, or was adjudged to have appealed without good cauſe, he was condemned in the expences [h].

ANOTHER way in which a cauſe might be ſubmitted to a ſuperior judge, was by *relation*. This was when ſome difficulty aroſe, and the judge choſe to refer it to the judgment of the pope, or ſome other ſuperior authority: this was to be before definitive ſentence. The grounds of the

[f] Corv. Jus Can. 273. [g] Ibid. 275. [h] Ibid. 276, 277.

CHAP. XXIV. HENRY VI. EDW. IV.

difficulty were to be ſet down in articles, and copies given to the parties, that any omiſſion might be ſupplied by them, and ſubmitted to the pope, or other perſon to whom the relation was made [i]. A *ſupplication* was a ſubſtitute for an appeal in caſes where the cauſe was determined before a judge from whom there lay no appeal, and the party had no reſource but to addreſs him by prayer and ſupplication [k]. A *recuſatio* might be conſidered in the light of an appeal: this was, when one of the parties declined the juriſdiction of the court, on ſuggeſting ſome cauſe of ſuſpicion againſt the judge. This ſhould be made before the *litis conteſtatio*, unleſs it aroſe afterwards, and then it might be made at any time, on the party ſwearing that it had not come to his knowledge before. Any partiality in the judge was a good cauſe of recuſation: this, however, was to be made out within a term appointed by the judge: and if it was not done within a year, the judge might proceed in the ſuit [l].

THUS far of ordinary proceedings, as directed by the canon law. The extraordinary, or ſummary juriſdiction, according to the ſame law, was, as they expreſſed it, *non in figurâ judicii, ſed ex officio judicis*, by inquiſition, or denunciation, or ſome other courſe *de plano*, and upon general grounds of equity. In ſuch caſe there was no tender of a ſolemn libel, nor was any conteſtation of ſuit neceſſary: the judge might proceed in times of vacation and holiday; he might refuſe to admit any delay, exception, dilatory and vain appeal; he might reſtrain the ſuperfluous number of witneſſes; give any term he choſe for the ſeveral ſtages of the proceeding; and might pronounce ſentence even before a concluſion was duly made. Such were the proceeding that was followed in cauſes of election, poſtulation, proviſion, dignities, offices, prebends, tythes, matrimony, uſury, and others [m].

[i] Corv. Jus Can. 279. [k] Ibid. 280. [l] Ibid. 277, 278, 279. [m] Ibid. 286.

CRIMINAL

CHAP. XXIV.
HENRY VI. EDW. IV.
Of proceedings in criminal ſuits.

CRIMINAL proceedings differed widely from the proceeding in civil ſuits. The proſecution of offenders in the canon law might be in three ways: by *accuſation*, by *inquiſition*, or by *denunciation*. We ſhall firſt conſider the nature of an accuſation.

Accuſation.

AN accuſation might be brought by all perſons that were not under the following diſabilities: an enemy could not accuſe an enemy, nor could a perſon guilty of any crime. It was laid down by the canon law, that a layman could not proſecute a clerk by accuſation, unleſs for an injury done to himſelf, or any one belonging to him; nor a clerk a layman, without an expreſs proteſtation that it was not for thirſt of blood, or puniſhment. Perſons of low condition could not accuſe clerks, unleſs they had before been in intimacy with them [n]. Women and infants were equally debarred, unleſs they proſecuted for any injury done to themſelves [o]. In general ſuch perſons were excluded from bringing an accuſation as were excluded by the civil law. However, theſe diſqualifications were diſpenſed with in the more atrocious crimes; for in læſe majeſty, in hereſy, and ſimony, all the foregoing perſons would be admitted to accuſe [p]. The civil law was likewiſe followed in preſcribing the perſons who were not to be liable to an accuſation; in addition to which the canoniſts held, that a prince might be accuſed of hereſy, perjury, and ſacrilege; with which crimes the canon law did not ſcruple to declare the pope himſelf might be charged.

AN accuſation ought regularly to be brought in the place where the crime was committed, unleſs the pope ſhould permit it to be brought elſewhere, or the crime could be examined better in another place, or it was an accuſation againſt a biſhop, or the *reus* was apprehended in ſome other place. No one was admitted to bring an accu-

[n] Corv. Jus Can. 346. [o] Launc. Inſt. Jur. lib. 4. tit. 1. [p] Corv. Jus Can. 346.

CHAP. XXIV. HENRY VI. EDW. IV.

ſation, till he had made what they called an *inſcription*, or engagement, to undergo the *lex talionis*, by ſuffering the puniſhment annexed to the offence, if he failed in making out his charge. A perſon who made a denunciation by reaſon of a public office which he filled, was not bound to make this *inſcription*; nor was one who accuſed for any inferior crime, or for apoſtacy [q].

When the accuſation was inſtituted, the cauſe proceeded by conteſtation of ſuit, exceptions, and ſo on, as in civil ſuits; unleſs in inferior offences, and thoſe of læſe majeſty and hereſy, which were judged of *de plano*, and notorious crimes, where no other proof was wanted, and there was no need of any judicial formality to be obſerved. Notorious offences were ſuch as were committed before the people, or any great aſſembly of perſons [r]. The accuſor and accuſed ought to be preſent at hearing the accuſation, unleſs in ſome particular caſes; as where the offence was only *de injuriâ*, and either of the parties was of ſome illuſtrious rank, and the proceeding, tho' in form a criminal one, was for a civil redreſs.

Inquiſition.

The mode of proſecution by *inquiſition* was when a judge, without any accuſor ſtanding forward, inquired *ex officio*, whether any and what perſon had committed an offence: it was accordingly either general or ſpecial. The former was an inquiry made by a biſhop, or other ſuperintending magiſtrate, whether any offenders were within his dioceſe or diſtrict: the latter was an inquiry by them, whether a certain crime was committed by a certain perſon [s]. *Inquiſition* might be made by the pope through his legates or delegates; by biſhops in their dioceſes; metropolitans in their provinces; in ſhort, by all perſons having criminal juriſdiction.

[q] Corv. Jus Can. 348.

[r] Lyndwode gives us two verſes from a canoniſt, in which the qualities of notoriety are thus expreſſed:

Quæ vel nemo negat, populo vel teſte probantur,
Vel ſe ſubjiciunt oculis, notoria dicas. Lynd. 323. n.

[s] Corv. Jus Can. 350.

INQUISITION was to be made only of the more enormous crimes, as ſimony, adultery, fornication, perjury, inceſt; nor was it to be made of crimes that were concealed and not known, but only of ſuch concerning which there had been an *infamia*, *diffamatio*, or evil report, founded upon public perſuaſion of the offence having been committed, and not upon the malevolent ſuggeſtions of thoſe who took malignant pains to ſpread the rumour. In the caſe of a prelate, beſides the *diffamatio* or *infamia*, there ought to be ſome ſcandal or danger, otherwiſe no inquiſition was to be made. If a *reus* was ſilent, (which ſilence was conſtrued into a confeſſion) he might be convicted without any preceding *infamia*, or at leaſt any inquiry into ſuch exiſting *infamia*[t]. All this relates to an inquiſition againſt a particular perſon; for a judge might make a general inquiry without any *infamia* preceding, and thence might come to a ſpecial inquiſition againſt a particular perſon. In a ſpecial inquiſition, the articles of inquiry were to be exhibited to the *reus*, and alſo the names and declarations of the witneſſes. Inquiſitions were to be made by means of proper perſons, and of good credit, and not thro' the enemies of the party, and perſons guilty of perjury. To what the inquiſition was to be directed, depended on the pleaſure of the judge. If the party was convicted of the crime by inquiſition, he did not undergo the ordinary puniſhment, but ſuch a one as the judge thought proper: if the crime was not proved, then he was to ſubmit to the canonical purgation, of which more will be ſaid hereafter.

THE third mode of proſecution, called *denunciation*, was when information was given of a concealed crime to the judge, without any of the formality of an accuſation. The canoniſts divided denunciation into *evangelical*, *cano-* Denunciation.

[t] Corv. Jus Can. 351.

nical,

CHAP. XXIV.
HENRY VI. EDW. IV.

nical, and *judicial*[u] The firſt was with no other view than that of amendment of the offender; as when a wife gave information to a prieſt of the adultery of her huſband. The ſecond was to prevent any thing unlawful from taking place; as giving information that certain perſons who were going to contract matrimony, were within the prohibited degrees. Judicial denunciation was either public or private: the former was done by a public officer, and always was preceded by an inquiſition made by the biſhop or other judge; the latter was by a private perſon who was concerned in intereſt to make it. By the canon law, all perſons who had ſome intereſt in the ſubject might make *denunciation*, and indeed other perſons who were actuated by a zeal for the public good[x]; not thoſe who were infamous, conſpirators, or enemies. A denunciation uſed to be made without inſcription; but tho' the informer was not bound in that manner to prove the crime, yet he was always required to take an oath of calumny, and name the witneſſes who were acquainted with the offence.

It was required[y], before a denunciation againſt a clerk, that there ſhould be a charitable admonition; but not in the caſe of laymen. The great object of denunciation was, that an offence being thus known to the judge, he ſhould have the power of making further inquiry concerning the truth of it[z].

If a *reus*, who was ſuſpected of a crime, could not be convicted on proof, he was not therefore to be abſolved, but was required to make out his innocence by canonical purgation. This was ſo called, becauſe impoſed by the canons, and to diſtinguiſh it from the vulgar purgation, which conſiſted in the ordeal, and had been reprobated, long ſince, by the clerical law. Canonical purgation was,

Purgation.

[u] Corv. Jus Can. 352.

[x] By a provincial conſtitution in Lynwode, certain perſons were appointed in every dioceſe to be denunciators.

[y] Corv. Jus Can. 353.

[z] Ibid. 354.

when

when a perſon made out his innocence by his own oath, ſwearing that he was not guilty, and the oaths of compurgators ſwearing that they believed him to ſpeak truth. This was to be directed by the judge who heard the cauſe in which he was defamed, and by no other. The judge directed purgation, either at the inſtance of the party who was to be purged, or to ſatisfy himſelf reſpecting the ſuſpicions under which the *reus* laboured. The judge might, if he pleaſed, though he was not bound to, enjoin purgation, even where the *infamia* did not ariſe from very probable conjectures.

PURGATION was not to be enjoined but where the *reus* was a credible perſon, who, tho' under ſuſpicions, would not be thought very ready to perjure himſelf; and it was only to be where the party was not convicted, either by legal proof, or his own confeſſion; where the crime was not notorious, but yet he was diffamed among good men upon probable ſuſpicions. The judge was to chuſe the compurgators from perſons of honeſt character, neighbours of the *reus*, and well acquainted with his life and converſation. They were to be ſometimes twelve, ſometimes ſeven, ſometimes more and ſometimes leſs, according to his diſcretion, conſidering the circumſtances, the nature of the offence, and the quality of the *reus* and compurgators. The purgation was to be made where the diffamation was: thus if he was diffamed by the people, it was to be before the people; if among clerks, before clerks; and the like. If he ſucceeded in his purgation, he was liberated from the charge; if he failed, he was puniſhed the ſame as if he was convicted, or had confeſſed[a].

IT appears unneceſſary in this place to bring back to the reader's recollection the conduct of criminal proſecu-

[a] Corv. Jus Can. 378, 379, 380.

tions

CHAP. XXIV.

HENRY VI. EDW. IV.

tions in our own law, as mentioned in the earlier parts of this Hiſtory. The ſimilarity between thoſe and theſe we have juſt been relating, is too ſtrong to need being pointed out. We now ſee, that not only purgation is a piece of law intirely canonical, but that the proceeding *per famam patriæ*, from whence was derived the preſentment of jurors, may be found elſewhere than in our municipal cuſtoms; and that, according to the accounts of our earlieſt writers, it was firſt practiſed among us upon ideas and principles purely canonical[b].

Excommunication.

THE puniſhments which the eccleſiaſtical court could inflict, were all of a ſpiritual kind; they conſiſted either in penance, excommunication, interdict, ſuſpenſion, removal, or degradation. Some of theſe cenſures require a little further conſideration.

EXCOMMUNICATION was divided into what they called the *greater* and the *leſs*. The latter only removed the perſon from a participation of the ſacraments, and is what was more commonly meant by excommunication: the other was called *anathema*, and not only removed the party from the ſacraments, but from the church, and all communion with the faithful. Excommunication ſometimes following *ipſo facto*, upon the commiſſion of an offence: this was called *canonical*, to diſtinguiſh it from that which did not depend upon any eſtabliſhed canon, but upon the paſſing of ſentence by a judge[c].

THE following offenders were *ipſo facto* puniſhed with the greater excommunication: all diviners and *ſortilegi*; heretics, their receivers and comforters; ſimoniacs; violators and plunderers of churches; thoſe who ſpoiled clerks going to Rome; the plunderers of the property of a bi-

[b] It may be here remarked, that ſuppoſing this proceeding to have been formed with an eye to the canon law, our conjecture about the offender's innocence being determined by the ſame perſons who ſuggeſted the *infamia*, or at moſt by purgation, without reſorting to another jury, is juſtified by the account given above of *inquiſitions*.

[c] Corv. Jus Can. 359.

ſhop

ſhop which ought to go to his ſucceſſor; thoſe who gave aid, favour, or counſel to excommunicated perſons; thoſe who laid violent hands on clerks or religious perſons, or commanded any ſo to do [d]. The following offenders were *ipſo facto* puniſhed with the leſs excommunication: all perſons committing any mortal ſin, as ſacrilegious perſons; thoſe who received a church from lay hands; notorious offenders; thoſe who talked with, ſaluted, or ſat at the ſame table with, or gave any thing in charity to perſons excommunicated by the greater excommunication, unleſs they were familiars or domeſtics [e].

THE greater excommunication could be inflicted only by one having criminal juriſdiction; the leſs might be impoſed by any clerk having the cure of ſouls. Excommunication was a cenſure that could paſs only againſt the living, except in the caſe of hereſy, which might be proſecuted after the death of the party. It could not from the nature of it be paſſed againſt pagans, who conſtituted no part of the church [f].

A SENTENCE of excommunication was to be preceded by three monitions at the due intervals, or one peremptory, containing the legal ſpace of time, with a proper regard to the quality of the perſon, and the nature of the buſineſs. The judicial courſe alſo ought to be obſerved, though the excommunication would hold without it, but not without the monition; and the judge who paſſed ſentence of excommunication without it, would be prohibited for a month *ab ingreſſu eccleſiæ*; and if proper, be ſubject to other penalties [g]. A ſentence of excommunication might paſs abſolutely or conditionally; as, "Unleſs you ſatisfy Sempronius within twenty days, I excommunicate you." The ſentence was to be put into writing, containing the cauſe thereof, and the name of the party [h].

[d] Corv. Jus. Can. 360.
[e] Ibid. 361.
[f] Ibid. 363.
[g] Corv. Jus. Can. 364.
[h] Ibid.

An

CHAP. XXIV. HENRY VI. EDW. IV.

An excommunication might be taken off in ſeveral ways. It might be revoked by the judge who paſſed the ſentence. Upon appeal, the judge *ad quem* might abſolve the party, or ſend him to the judge *a quo* to abſolve him. Abſolution belonged to the ſame perſon who paſſed the ſentence, unleſs in ſome particular caſes that were referred to the pope or a biſhop [i]. Abſolution in ſome caſes uſed not to be given, till ſecurity was entered into by the party for making ſatisfaction [k].

Interdict.

AN *interdict* was an eccleſiaſtical cenſure, by which a certain place or certain perſons were interdicted from the participation of divine rites, ſepulture, and the ſacraments, till the commands of the church were obeyed. This, like excommunication, was either *ipſo facto* by the preciſe direction of the law, or by ſentence of the judge. Of the former kind was ſuch as was denounced againſt a community or city which did not expel uſurers, or which permitted repriſals againſt eccleſiaſtical perſons, or did not make them good within a month; a lord who would not admit a legate or apoſtolic meſſenger within his territory; a church polluted [l] with human blood, or conſecrated ſimoniacally.

A SENTENCE of interdict might be paſſed by all who could paſs ſentence of excommunication; an ordinary, delegate, biſhop, provincial ſynod. An interdict, if for contumacy, ſhould be preceded by monition; but this was not neceſſary, if for an offence [m]. An interdict, if iſſued againſt a people by the term *populus*, was conſtrued not to include the clergy. During an interdict, in early times, none of the eccleſiaſtical offices could be celebrated, nor any of the ſacraments, except the baptiſm of infants, and the penitence of dying perſons [n]. This was in ſubſequent times relaxed; and baptiſm and confirmation were allowed to all; penitence and the euchariſt to the dying;

[i] Corv. Jus. Can. 367, 368.
[k] Ibid. 369.
[l] Ibid. 371.
[m] Corv. Jus. Can. 372.
[n] Ibid. 373.

but

but not extreme unction to the laity, though it was to the clergy: at length they allowed maſs and other divine ceremonies to be performed once a-week, in ſome few churches and monaſteries, with a low voice, and the doors ſhut, without ringing of bells; and afterwards they allowed it in all churches, every day, though with the obſervance of the other reſtrictions; which, however, need not be adhered to on certain great feſtivals of the year. Perſons who did not obey ſuch interdict would be depoſed, and rendered incapable of taking a benefice [o]. An interdict might be confined to certain perſons, or to a certain place; it might be removed by abſolution, as excommunication was.

Suſpenſion.

SUSPENSION was an eccleſiaſtical cenſure, by which a ſpiritual perſon was interdicted from the exerciſe of his office, or order, or both; intirely, or in part, for a time, or *in perpetuum*. This, like the two former, was either *ipſo facto*, and canonical, or impoſed by the ſentence of a judge [p]. *Remotion*, or *depoſition* (which is the laſt eccleſiaſtical cenſure we have to mention), like the former, only related to eccleſiaſtical perſons, who might thus be depoſed, either from their dignity, order, or degree: depoſition was only by ſentence, and the ſentence of a biſhop [q]. *Degradation*, ſometimes called *ſolemn depoſition*, was the ſolemn detraction of the higher orders. The ſolemnity was this: If an abbot was to be degraded, it was to be in the preſence of abbots; if a preſbyter, of ſix biſhops; and alſo in the preſence of the ſecular judge, to whom he was to be delivered when degraded. In the preſence of theſe parties, the biſhop was to ſhave the head of the *reus*; then he was to ſcrape with glaſs or iron thoſe parts of the head and hands which were anointed at the time of his ordination; after this, he was to take off, in an order intirely reverſed from that in which it was put on, his clerical habit.

[o] Corv. Jus Can. 374. [p] Ibid. 375. [q] Ibid. 376.

WHEN

CHAP. XXIV.

HENRY VI. EDW. IV.

When this was performed, the party became, to all purposes, a layman; and being thus deprived of all his clerical privilege, was delivered over to the secular court, to be punished by the secular laws. This punishment of degradation was inflicted only in three cases; in case of a heretic, of a falsifier of the pope's letters, and of one who had practised against, or any ways calumniated, his bishop[r].

[r] Corv. Jus Can. 377, 378.

CHAP.

CHAP. XXV.

HENRY VI. EDWARD IV.

Of Eccleſiaſtical Juriſdiction—Of Matrimony—Eſpouſals—Nuptiæ—Of Cognation—Conſanguinity—Affinity——Of Divorce—Jactitation of Marriage—Of Wills and Teſtaments Executors—Of the Forms of Wills, &c.—Of Probate—Of Inteſtacy—Of Pious Uſes—The Rationabilis Pars—Tithes—Sylva Cædua—Compoſition for Tithes—Spoliation Suits de Læſione Fidei—Defamation—Prohibitions—Provincial Conſtitutions—King and Government—The Statutes—Forteſcue—Littleton—Lyndwode—Printing of Law-Books—Miſcellaneous Facts.

CHAP. XXV.
HENRY VI.
EDW. IV.

SUCH was the juridical ſyſtem which the Roman canoniſts had been labouring ſo many years, with ſuch perſeverance and energy, to eſtabliſh in our eccleſiaſtical courts: and notwithſtanding they were, as we have ſeen, in ſome inſtances, diſappointed of their object, they ſucceeded in gaining preſcription for more than ſeven parts in ten of the pontifical law, which, under controul of the temporal judges, became the prevailing rule of deciſion in the eccleſiaſtical courts. It is now our buſineſs to enquire more particularly what was the extent of this juriſdiction, what objects it embraced, and in what manner it treated them. This has been ſlightly touched in the reign of Henry III[a]; but ſo much time had elapſed, and ſuch

[a] Vid. ant. vol. I. 454, 455, &c; and vol. II. 79.

controverſy

CHAP. XXV.
HENRY VI.
EDW. IV.

controverſy had ſince happened upon queſtions of judicature between the clerical and temporal courts, that the ſubject is ſtill open to further illuſtration; and it will be curious to ſee how the law of antient times is either corroborated, new modelled, or altered by later opinions.

Of eccleſiaſtical juriſdiction.

Of the objects which the canoniſts claimed as belonging to their juriſdiction, our temporal courts had long appropriated to themſelves to decide excluſively upon rights of patronage, and upon all crimes affecting life and limb. *Freehold* and *chattels* were two other deſcriptions that marked many articles of judicature as ſubject ſolely to the deciſion of the common-law courts. On the other hand, the judges ſeem to have given themſelves no concern as to the mode in which the eccleſiaſtical court proceeded with cauſes that were left to their determination. The ſpiritual tribunal was permitted, undiſturbed, to enjoy the privilege aſſumed by all courts, of forming its own courſe of proceeding; and it accordingly adopted, without any material variation, the practice of the canon law mentioned in the foregoing chapter. Without, therefore, entering any farther into the nature of judicial proceedings, we ſhall briefly recapitulate the ſeveral objects upon which they might be employed; moſt of which have been frequently mentioned in the former parts of our Hiſtory, either from Bracton, or the famous conſtitution of Boniface, in the reign of Henry III; the ſtatutes of *circumſpectè agatis*, or *articuli cleri*; or on ſome other of the many occaſions when the juriſdictions of the temporal and clerical court came into competition [b].

The two grand deſcriptions of cauſes which ſeemed more indiſputably than any others within the cogniſance of this tribunal, were *matrimonial* and *teſtamentary*, and their incidents. Under teſtamentary were included laſt wills, codicils, legacies, adminiſtration and ſequeſtration,

[b] Vid. ant. vol. I. 454; and vol. II. 79. 215. 291.

commonly

commonly called letters *ad colligendum*. Under matrimonial were included, divorce; jactitation of marriage; queſtions of legitimation and baſtardy; ſuits for reſtitution of a man's wife taken away; ſuits to compel a man to receive his wife again; and ſuits for goods promiſed with a woman in marriage. Theſe were the principal and more important objects of juriſdiction; the remainder, which may with our canoniſts be conſidered as *reliqua jura eccleſiaſtica*, were claſſed in the following way:

First, ſome duty ariſing upon the exerciſe of voluntary juriſdiction, and by denial made litigious; ſuch as *real compoſitions*, when attempted by ſome perſons to be annulled; procurations, penſions, indemnities, fees for probates, and the like: or ſecondly, ſuch demands as became due only upon exerciſe of litigious juriſdiction; as fees of court, fees to advocates, proctors, apparitors, and the like: or thirdly, ſuch as were due to a miniſter in the church who had no title; as a ſalary to a curate or a clerk: or fourthly, to a miniſter who had a title; and then it was either ſomething incident to him, as to name a pariſh-clerk, or concerning the whole title and intereſt of his benefice; for though the right of patronage was cogniſable only in the temporal court, yet the avoidance or ſpoliation belonged to the court chriſtian. Next follow the dues that concern a miniſter's maintenance; as tithes, oblations, obventions, penſions, mortuaries, church-yards, or places of burial: and laſtly, ſuch things as are due to a whole pariſh; as to have a chaplain found, or divine ſervice performed, or ſacraments adminiſtered amongſt them, or any thing due to their church; or for a pariſhioner to be contributory with the reſt to reparation of the church, for ſeats, bells, books, utenſils, and other ornaments or neceſſaries for the church. Thus far of thoſe things that were objects of juriſdiction in conſideration of their being *jura eccleſiaſtica*.

The

CHAP. XXV.

HENRY VI. EDW. IV.

THE crimes and offences puniſhable by the court chriſtian, were divided into ſuch as were contrary either to piety, juſtice, or ſobriety. Of the firſt claſs were blaſphemy, ſwearing, idolatry, hereſy, error in faith, ſchiſm, apoſtacy, not frequenting public prayer, neglect of the ſacraments, perjury in an eccleſiaſtical court or matter, diſturbance of divine ſervice, violating and profaning the ſabbath. Of the ſecond were ſimony, uſury, diffamation, ſubornation of perjury in a court eccleſiaſtical, violence to a miniſter, ſacrilege, dilapidations, not building of a church as enjoined by a teſtator, not fencing a church-yard, not repairing a church or chancel, or not keeping it in good repair; a church-warden refuſing to give an account of the church ſtock and goods; the violating of a ſequeſtration made for tithes not paid; hindering to gather or carry tithes; money promiſed for redeeming corporal penance; contempt of the eccleſiaſtical juriſdiction; the violation of churches and church-yards. Of the laſt claſs were all incontinence not made capital by the common law, whether it was inceſt, adultery, *ſtuprum* or ſimple fornication, polygamy, the ſolicitation of a woman's chaſtity, drunkenneſs, filthy ſpeech, or the like irregularities [c].

THE objects of clerical juriſdiction, when thus enumerated and placed in array, make a very formidable appearance: and when we reflect, that many ſpiritual offences were the conſequences of habit and conſtitution; that the cenſures inflicted on ſuch offenders might be commuted for money, payable to the judge himſelf; and that there was ſuch a judge in every dioceſe to enforce the execution of the law; it muſt be confeſſed, that the eccleſiaſtical maintained againſt the temporal power a divided empire,

[c] Vid. An Apologie of certaine Proceedings in Courts Eccleſiaſticall, printed in the reign of Queen Elizabeth, Part I. page 18.

which

which if not ſo extenſive, was more vigilant, more oppreſſive, and more odious to perſons of both ſexes, and of every rank and age in the kingdom; and was capable of producing great good or great evil [d].

In

[d] Our old Engliſh Bard has given us a very ſpirited comment upon the practice of the ſpiritual court, which, if it is not overcharged, deſerves all the credit of a cotemporary expoſition of the conduct and manners of its retainers. In the Canterbury Tales, Chaucer introduces a Friar, and a Sumpnour, or Apparitor, who uſed to ſerve the *ſummons* and citations of the biſhop's court. The latter had ſhewn a violent diſpoſition to quarrel with the former, which the Friar attributes to his fraternity being exempt from the juriſdiction of the biſhop, and ſo not liable to be pillaged by the Sumpnour's extortion. This perhaps might be the true cauſe, and it accordingly drew more ill language upon the poor Friar; who, when it came to his turn, revenged himſelf by telling a malicious ſtory of a Sumpnour. He begins with an account which ſeems to deſcribe the juriſdiction of the ſpiritual court very fully.

Whilom ther was dwelling in my contree
An archedeken, a man of high degree,
That boldely did execution
In puniſhing of fornication,
Of witchecraft, and eke of bauderie,
Of defamation, and avouterie;
Of chirche-reves, and of teſtaments,
Of contracts, and of lack of ſacraments;
Of uſure, and of ſimonie alſo;
But certes lechours did he greteſt wo;
They ſhulden ſingen, if that they were hent,
And ſmale titheres weren foule yſhent:
If any perſone wold upon hem plaine,
Ther might aſtert hem no pecunial peine.
For ſmale tithes, and ſmale offering,
He made the peple pitouſly to ſing;
For er the biſhop hent hem with his crook,
They weren in the archedeken's book;
Then had he, thurgh his juriſdiction,
Power to don on hem correction.

Of all theſe points of judicature, none was ſo fruitful to the court as that of incontinence; this was a weed to be found in moſt ſoils, and the Sumpnour was always hunting for it. The Friar tells us,

A Sumpnour is a renner up and down
With mandements for fornication,
And is ybete at every toune's ende.

The Friar makes the ſuppoſed Sumpnour's diligence to be moſtly engaged on this part of his employment. After the above account of the archdeacon and his court, he goes on thus:

He had a Sumpnour redy to his hond,
A ſlier boy was non in Englelond;

For

CHAP. XXV.

HENRY VI.
EDW. IV.

In order to obtain a more clear idea of the clerical judicature, we ſhall now take a nearer view of the different objects

For ſubtilly he had his eſpiaille,
That taught him well wher it might ought availe;
He coude ſpare of lechours on or two,
To techen him to foure and twenty mo.

This falſe theef, this Sumpnour (quod the Frere)
Had alway baudes redy to his hond,
As any hauke to lure in Englelond,
That told him all the ſecree that they knewe,
For hir acquaintance was not come of newe;
They weren his approvers prively.
He tooke himſelf a gret profit therby,
His maiſter knew not alway what he wan.
Withouten mandement, a lewed man
He coude ſompne, up peine of Chriſte's curſe,
And they were inly glad to fill his purſe,
And maken him gret feſtes at the nale.
And right as Judas hadde purſes ſmale,
And was a theef, right ſuch a theef was he,
His maiſter hadde but half his duetee.
He was (if I ſhall yeven him his laud)
A theef, and eke a Sumpnour, and a baud.
He had eke wenches at his retenue,
That whether that Sire Robert, or Sire Hue,
Or Jakke, or Rauf, or whoſo that it were
That lay by hem, they told it in his ere.
Thus was the wench and he of on aſſent,
And he wold fecche a feined mandement,
And ſompne hem to the chapitre bothe two
And pill the man, and let the wenche go.
Then wold he ſay, Frend, I ſhall for thy ſake,
Do ſtrike thee out of oure lettres blake;
Thee thar no more as in this cas travaille,
I am thy frend, ther I may thee availle.
Certain he knew of briboures many mo
Than poſſible is to tell in yeres two:
For in this world n' is dogge for the bowe,
That can an hurt dere from an hole yknowe,
Bet than this Sumpnour knew a ſlie lechour,
Or an avowtrer, or a paramour;
And for that was the fruit of all his rent,
Therfore on it he ſet all his intent. [*See the Frere's Tale*]

The game which theſe ſpiritual bailiffs were in the practice of playing, by ſuch well-timed activity and connivance, is noticed by Chaucer, in the character he gives of this very Sumpnour, againſt whom all the laugh was raiſed by the Friar.

He was a gentil harlot and a kind,
A better felaw ſhulde a man not find.

He

objects of its jurisdiction, beginning with causes matrimonial and testamentary, and then proceeding to tithes, and the others before enumerated. CHAP. XXV. HENRY VI. EDW. IV.

Of

He wolde ſuffre for a quart of wine,
A good felaw to have his concubine
A twelve month and excuſe him at the full.
Full prively a finch eke coude he pull.
And if he found o where a good felawe,
He wolde techen him to have non awe
In ſwiche a cas of the archedeken's curſe,
But if a mannes ſoule were in his purſe;
For in his purſe he ſhulde ypuniſhed be;
Purſe is the archedeken's helle, ſaid he.
But well I wot he lied right indede:
Of curſing ought eche gilty man him drede.
For curſe wol ſle right as aſſoiling ſaveth,
And alſo ware him of a *ſignificavit*.
In danger hadde he at his owen giſe,
The yonge girles of the dioceſe;
And knew hir counſell, and was of hir rede. [*See the Prologue*]

To go on with the Friar's Tale, who brings the Sumpnour into converſation with a bailiff.

Brother, quod he, here wonneth an old Rebekke,
That had almoſt as leſe to leſe hir nekke,
As for to yeve a peny of hire good.
I wol have twelve pens though that ſhe be wood,
Or I wol ſomone hire to our office;
And yet, God wot, of hire know I no vice.

He then deſcribes him as knocking at the woman's door, and entering upon the execution of his office, in the following manner.

I have, quod he, of ſomons here a bill:
Up peine of curſing, loke that thou be
To-morwe before the archedeken's knee,
To anſwere to the court of certain things.

May I not axe a libel, Sire Sumpnour,
And anſwere ther by my procuratour,
To ſwiche thing as men wold appoſen me?
Yes, quod this Sumpnour, pay anon, let ſee,
Twelf pens to me, and I wol thee acquite,
I ſhall no profit han therby but lite;
My maſter hath the profit, and not I;
Come of, and let me riden haſtily;
Yeve me twelf pens, I may no langer tarie.

The ſequel of the Tale is not to our purpoſe, except that the woman being unable to pay the money, the Sumpnour is repreſented as pretending

CHAP. XXV.

HENRY VI. EDW. IV.

Of all articles of judicial cogniſance which the eccleſiaſtical court claimed excluſively to entertain, that of *matrimony* ſeems to have been leaſt controverted by the temporal judges. When marriage was admitted by the religion of the country to be a chriſtian ſacrament, the juriſdiction of ſpiritual judges could not well be diſputed. We accordingly find no parliamentary interpoſition on this head, but the eccleſiaſtical court was left to decide in matrimonial cauſes upon the pure principles of canonical juriſprudence.

Of matrimony.

MATRIMONY was defined by the canoniſts in this manner: *Viri et mulieris conjunctio, individuam vitæ conſuetudinem, cum divini et humani juris communicatione, continens.* This union of man and wife was preceded by *ſponſalia*, or eſpouſals, the nature of which muſt be firſt conſidered, before we come to ſpeak of matrimony. Eſpouſals were the promiſe of a marriage that was to take place, and were divided into eſpouſals *de præſenti*, and eſpouſals *de futuro*. Thoſe of the former kind were conſidered in the ſame light as matrimony; ſo that eſpouſals, properly ſo called, were the latter; which were, when a promiſe of a future marriage was made by words of a future ſignifi-

Eſpouſals.

pretending to have compounded at the office former irregularities committed by her, and that ſhe had never reimburſed him: to indemnify himſelf, therefore, for both demands at once he is made to ſeize on a piece of her furniture

This vindictive Tale ſets the officers of the ſpiritual court in a very diſgraceful light, and reflects ſome ſcandal on the court itſelf. Making allowance for exaggerations, we may, however, collect from this and other notices, that the officers of the biſhop were perhaps as numerous, as well known, and as much regarded as thoſe of the ſheriff; that irregularities of conduct, if known, were as conſtantly corrected, as the depredations of robbers; and that the power and juriſdiction of this tribunal was, therefore, continually before the eyes of the people. Such conſiderations as theſe can alone account for the great heat with which queſtions of judicature were conteſted on both ſides. When the reformation of religion had lowered the pretenſions of the clergy, and altered the ſentiments of the people reſpecting eccleſiaſtical authority, the biſhop's court exerciſed its juriſdiction with great tenderneſs and ſcruple, till at length it ſunk into neglect, und almoſt into oblivion. The ſtate of things at preſent is very much altered. It is rarely that eccleſiaſtical judicature is now heard of any where but in the courts that are collected together in *Doctors Commons*.

cation;

cation; as, "I will take you to wife." Such eſpouſals might be *nuda et ſimplicia*, or *firmata*, as the canoniſts called them: the former was where a mere promiſe was made; the latter was where ſome earneſt or pledge preceded; as a ring given, or an oath taken. Eſpouſals muſt be contracted by conſent, whether expreſſed in words, or by ſome ſign; as that of a ring, a gift, a kiſs, or embrace; by a letter, meſſenger, or procurator. A ring, to anſwer this purpoſe, muſt always be accompanied with ſome ſigns to expreſs both that it was given and received by way of eſpouſals; and any doubt on this point was to be determined by the eccleſiaſtical judge.

All perſons who had completed their ſeventh year, were held competent to contract eſpouſals; and eſpouſals contracted even before that age, might be ratified by a regular conſent. It was no impediment that a perſon was deaf and dumb, provided he had his intellects, and could expreſs his mind by ſigns. Eſpouſals might alſo be contracted by third perſons for the party; as by a father for a ſon, a mother for a daughter, an uncle for a nephew, by tutors and curators for their pupils. But theſe had no legal effect, unleſs the party when of age of puberty ſignified his conſent; which in caſe of a promiſe by a father might be a tacit conſent, but in other caſes muſt be expreſs: if the party was preſent, and preſerved a ſilence, it was held to be a tacit aſſent. Eſpouſals were made either *purè*, or with appointment of a day, or *ſub conditione*. If the promiſe contained neither of the latter qualifications, it was ſaid to be made *purè*. A promiſe on condition made the performance of it depend on ſome event, and till that took place it had no effect; unleſs a *carnalis copula* intervened, or the condition was ſuch as the law pronounced to be *turpis*.

Espousals, when once contracted, ſo bound the parties, that they could not retract, but each had a *jus matrimonii*, ſo as to be able to inſtitute a ſuit for the eccleſi-

aſtical

CHAP. XXV.
HENRY VI.
EDW. IV.

aſtical judge by cenſures to compel the other party to conſummate the marriage. Indeed, if a *carnalis copula* ſucceeded, the marriage was completed without more ceremony; for notwithſtanding the maxim, that *non concubitus ſed conſenſus facit matrimonium*, the church preſumed that by ſuch act the party meant to perform his promiſe, rather than commit the ſin of fornication. This was a preſumption which did not admit any proof to the contrary, and it could be done away only by ſhewing that the eſpouſals had before been legally diſſolved, or were in themſelves null and void. If there were more than one eſpouſals, the former were preferred, even tho' the latter had been ſanctioned by an oath; unleſs indeed a *carnalis copula* had taken place. The effect of eſpouſals was to create ſuch a relationſhip, that the *conſanguinei* of the *ſponſus*, or man eſpouſed, could not, upon his death, or the diſſolution of the eſpouſals, marry with the *ſponſa*, nor *vice verſâ*.

MANY were the cauſes which were held by the canoniſts ſufficient to diſſolve eſpouſals. They might be diſſolved by mutual conſent, even tho' ſanctioned by an oath; by abſolution of the judge; by other eſpouſals confirmed by a *carnalis copula*; by affinity ſupervening, tho' by an illicit *copula*; by entry into religion: by fornication, whether corporal or ſpiritual, as if either party fell into hereſy or idolatry; by lapſe of time, as if they had let the day mentioned in the contract paſs; or, if no day was fixed, an abſence of three years; for if a perſon was abſent ſuch a length of time without ſufficient cauſe, the other party might contract afreſh; by failure in performing a condition, if any was annexed; by report of a canonical impediment; by *capitales inimicitiæ* happening between the perſons eſpouſed; by aſperity of manners in either party; by deformity, or any contagious diſorder; in all which caſes other eſpouſals might be contracted, without the authority of the judge, if the cauſe was notorious in point

of

of fact, and likewiſe plain in point of law; if not notorious, then by the ſentence of a judge [e].

ESPOUSALS *de præſenti*, as was before ſaid, were in effect a contract of marriage celebrated *per verba de præſenti*. The definition of *matrimonium* or *nuptiæ* was given before: upon that definition it is ſufficient to remark, that the words *divini humaniq; juris communicationem*, expreſſed that the parties ſhould be of the ſame religion. Chriſtians, by the canon law, could not contract matrimony with Pagans, Jews, or Turks, under pain of excommunication. Matrimony was conſidered in various lights: firſt, it was public or clandeſtine: the former was celebrated in the preſence of witneſſes with all the due ſolemnities; the latter was without either. Again, matrimony was divided into *legitimum et non ratum*, and *ratum et non legitimum*, and *legitimum et ratum*.

Nuptiæ.

A MARRIAGE was ſaid to be *legitimum et non ratum*, if it was celebrated between Jews and Infidels, and it was called *non ratum*, becauſe it might be diſſolved by repudiation: whereas marriage among chriſtians was indiſſoluble, and was therefore called *ratum*; ſo that a marriage *ratum et non legitimum* was ſuch as was among chriſtians, without the canonical ſolemnities; that which was *ratum et legitimum* was a marriage among chriſtians, attended with all the due canonical ſolemnities. This is the marriage which it is our buſineſs to conſider.

FOR a marriage to be contracted in a legitimate way, it was neceſſary to have the conſent not only of the parties, but of the parents, if they had any; and if there was any force, or fear, or error, theſe were circumſtances that vitiated a marriage, and rendered it void. The *metus* was ſuch as *in conſtantem virum vel fœminam poteſt cadere*; and the *error* was to be concerning ſomething neceſſary to the marriage, as the identity of the perſon, and not his qua-

[e] Corv. Jus Can. 79 to 84. Launc. Inſt Jur. Can. lib. 2. tit. 9, 10.

lity

CHAP. XXV.
HENRY VI.
EDW. IV.

lity or fortune. There were other impediments to matrimony than these three, and these impediments were divided into such as impeded the contract of marriage, and if completed, dissolved it; and those which impeded, but did not dissolve, the contract. Of the former kind were force, fear, and error, which have just been mentioned; to which the canonists added *cognatio*, *justitia publicæ honestatis*, *votum solemne*, *ordo*, *crimen*, *coeundi impotentia*, *cultûs disparitas*.

Cognation.

THE impediment of *cognation* was that upon which the canonists had employed great attention; and by various subtleties they had extended it to such unexpected consequences, that the compass within which marriage might be contracted, was by these means greatly narrowed.

THEY divided cognation into *spiritual*, *carnal*, and *legal*. Spiritual was such as arose from baptism or confirmation. Thus there was a *compaternitas* between the spiritual father who baptised, the sponsor for the child[f], and the father of it; and a *paternitas* between the person baptising and the child baptised, the sponsor and the child. There was in like manner a *fraternitas* between the children of the person baptising, or of the sponsor, and the child baptised; and such cognation in either of these instances was an impediment which would both obstruct marriage, and dissolve it, if contracted. The canonists, however, had guarded against one probable consequence of this cognation; for if the father or mother of the child should happen to be sponsors, this was not held to be a cause of separation, tho' it was an irregularity that constituted a spiritual offence[g].

[f] *Qui puerum suscipit de fonte*; this was done by the *sponsor*, or godfather.

[g] The Council of Trent made an alteration in this point of spiritual cognation; for it was there decreed, that the prohibition of marriage was only to be between the child and its father and mother and the sponsor; and between the person confirming and the confirmed, and its father and mother; and the person *holding it* at the time of confirmation; without extending to the descendants in either case. Corv. Jus Can. 90, 91.

THE

THE *cognato carnalis* aroſe either from conſanguinity or affinity. Conſanguinity, which was ſometimes ſignified by the general appellation of *cognation*, is defined by the canoniſts to be, *vinculum perſonarum ab eodem ſtipite deſcendentium, vel aſcendentium, carnali propagatione in matrimonio, vel extra illud, contractum.* There are three conſiderations relating to this point, which are the *ſtipes*, *linea*, and *gradus*. The *ſtipes* was the ſtock from which the perſons, whoſe relationſhip was in queſtion, deſcended; and this was never computed as a degree. *Linea* was defined to be *collectio perſonarum ab eodem ſtipite deſcendentium, diverſos continens gradus, et numeros diſtinguens.* It was either the *right* line *ſuperior*, containing the aſcendants; or *inferior*, containing the deſcendants; or *tranſverſe*, which was between the brothers and other *cognati.*

Conſanguinity.

THE tranſverſe line was either *equal*, which was when the *cognati* were equally diſtant from the *ſtipes*; or *unequal*, which was when they were not. Thus brothers were in an equal line, becauſe both were diſtant in the ſame degree from the father: the brother and brother's ſon were in an unequal line, becauſe the brother was diſtant from the father in the firſt degree, but the brother's ſon in the ſecond. A *gradus*, or degree, is defined, *habitudo diſtantium perſonarum quâ propinquitatis diſtantia inter perſonas duas vel diverſas diſcernitur.* The canon law, as it conſidered the degrees with a view to marriage, which ſubſiſted by the conſent of two parties, for that reaſon always joined two perſons in reckoning them. This was done differently in the right line, and in the tranſverſe line; for in the right line, whether ſuperior or inferior, it was a rule, *quot generationes numerantur, tot numerantur gradus, dempto ſtipite:* thus every perſon, whether aſcending or deſcending, added a degree. In the tranſverſe line, if equal, the rule was, *quoto gradu unuſquiſq; eorum diſtat à ſtipite, eodem diſtant inter ſe.* Thus, *patrueles* and *conſobrini* are

CHAP. XXV.
HENRY VI.
EDW. IV.

are distant in the second degree from the common stock, and therefore, by the canon law, were deemed in the same degree from each other; so that two degrees, as reckoned in the civil law, constitute only one in the canon law. In the *transverse unequal line* the rule was, *quoto gradu remotior distat à stipite, eodem distant inter se*: thus the brother's son was distant in the second degree from the uncle, because he was distant from the grand-father, the common stock, in the second degree.

THUS stood the law of consanguinity, according to the computation of the canonists; and the manner in which they applied it to the subject of marriage was this. In the right line, whether ascending or descending, all marriage was prohibited *in infinitum*, and such as were contracted would be dissolved. In the transverse line, marriage was formerly prohibited as far as the seventh degree, and lately to the fourth degree only inclusive *: however, they held that such prohibited marriages contracted between infidels, who were afterwards converted, should not be dissolved.

Affinity.

THUS much of consanguinity: affinity, the other branch of cognation, was defined to be, *personarum necessitudo, ex coitu proveniens*, whether lawful or unlawful. Affinity, however, did not extend to the *affines* of the married person, nor to the *cognati* of the man and woman between themselves. The degrees of affinity were calculated by the same rule as those of consanguinity; for as man and wife were one flesh, so in whatsoever degree of consanguinity *Titius* or *Titia* stand to me, in the same degree of affinity would stand the husband of the one or the wife of the other. Affinity was of three kinds. The first kind of affinity was contracted by one person, the second by two, and the third by three. For example, my brother is

* There seems to have been some ambiguity as to the decrees prohibited in England. By a constitution of Archbishop Lanfranc, no marriage was to be allowed within the seventh degree; and yet we find that stat. 3d Hen. VIII. c. 38. speaks of the prohibition as confined to the fourth, or fifth degree.

my

my *conſanguineus*, his wife Mævia is related to me in the firſt kind of affinity; if my brother died, and Mævia married Titius, he would be related to me in the ſecond kind; and if Mævia died, and Titius married another wife, ſhe would be related in the third kind of affinity. The wifes or huſbands of two who were related by conſanguinity, were related to each other by an affinity of the ſecond kind. In ſhort, the huſband or wife of one related to me by conſanguinity, is related to me by an affinity of the firſt kind; the huſband or wife of ſuch relation, in the firſt kind of affinity, is related to me in the ſecond; and the huſband or wife of a perſon related to me in the ſecond kind, is related to me in the third kind of affinity.

THE manner in which this law of affinity was applied to marriage, was this: in like manner as marriage between *conſanguinei*, in the aſcending or deſcending line, was prohibited *in infinitum*; it was equally ſo among thoſe related by affinity, becauſe they were conſidered *in loco parentum et liberorum*; ſo that no marriage could take place between me and the *conſanguinei* of my wife in the right line. The ſame prohibition extended to thoſe in the tranſverſe line, as far as the ſeventh degree in the firſt kind of affinity; to the fourth degree, in the ſecond kind; and to the ſecond degree, in the third kind. It muſt be remarked, that the affinity to impede marriage, muſt be ſuch as ſubſiſted before the marriage, and not ſuch as might afterwards ſupervene. Such ſubſequent affinity would neither diſſolve a marriage, nor eſpouſals *de præſenti*, tho' it would eſpouſals *de futuro*.

ALL theſe impediments, whether from conſanguinity or affinity, might be diſpenſed with by the pope, upon ſhewing ſome true and lawful cauſe for ſuch diſpenſation. But even on this prerogative of the ſovereign pontiff the canoniſts had impoſed ſome reſtrictions; for it was held, that he could grant no diſpenſation to make a marriage lawful, if the impediment was in the right line; but only in the

CHAP. XXV.
HENRY VI. EDW. IV.

the collateral, and in that too not nearer than the ſecond degree. For, ſay the canoniſts, the pope in the plenitude of his power could diſpenſe with the law only where he violated neither the articles of faith, nor the general ſtate of the church.

THE laſt ſort of cognation, called *cognatio legalis*, is defined to be, *perſonarum proximitas ex adoptione vel arrogatione ſolenni ritu factâ proveniens*. This both impeded and diſſolved matrimony between aſcendents or deſcendents, not only during the adoption, but even if it was at end; in the tranſverſe line, only while the adoption ſubſiſted. But the law of adoption never having prevailed in this country, no impediment could ariſe to marriage on this conſideration. Thus far of cognation in all its parts.

THE next impediment was what the canoniſts termed *juſtitia publicæ honeſtatis*; and this they defined, *propinquitas ex ſponſalibus proveniens, robur ex inſtitutione eccleſiæ trahens propter ejuſdem eccleſiæ honeſtatem*. This both impeded and diſſolved marriage; and it extended to the fourth degree. The *votum caſtitatis ſolemne*, and *ordo ſacer*, are impediments that need no particular obſervation. The *crimen adulterii* became an impediment in this manner: If any one, during the life of his wife, contracted matrimony or eſpouſals with another, and a *carnalis copula* enſued, and the woman knew he had another wife, ſuch marriage could not afterwards be eſtabliſhed even by the death of the firſt wife: but if ſhe was ignorant of his having another wife, and no *carnalis copula* had taken place, the marriage might be contracted after the death of the firſt wife. *Impotentia*, if natural, would both impede and diſſolve marriage; and ſo, if accidental, and before the marriage; but if the accident happened after the marriage, it had not that legal conſequence.

OTHER impediments there were, which only impeded but did not diſſolve marriage. Theſe were *furor, interdictum, feriæ, catechiſmus, votum ſimplex, crimen*. A perſon

perſon who was mad, might, however, during a lucid interval, contract marriage. The *feriæ*, within which marriage could not be celebrated, were from Advent to Epiphany; from Septuageſima to the octave of Eaſter; and from the firſt Rogation-day to the octave of Penteceſt. Catechiſm was conſidered as an impediment, on account of the ſpiritual cognation which was ſuppoſed to be thereby created.

The crimes which impeded, but did not diſſolve, marriage were theſe: *inceſtus, uxorcidium, raptus, ſuſceptio proprii filii de fonte, preſbytericidium, pœnitentia ſolemnis.* The manner in which inceſt was an impediment, is thus explained by the canoniſts: If a perſon committed inceſt with a perſon in conſanguinity with his wife, and of courſe in affinity with him, this fact made him aſſume an affinity with his wife, ſo as to diſable him from claiming the conjugal rites during her life, and, when ſhe died, from contracting matrimony. The impediment from receiving his own child from the font, was, in like manner, that he could not demand of his wife the conjugal rites. A perſon who killed his wife (and ſo alſo a wife who killed her huſband), or one who killed a preſbyter, or who had incurred the puniſhment of any ſolemn penance, could not contract matrimony. It was required by the canons, that a marriage ſhould be celebrated publicly in the face of the church or in ſome aſſembly of the faithful, repreſenting the church; and the pariſh-prieſt, or ſome one by his permiſſion, was to pronounce his benediction[h].

We ſhall now add a few words on *clandeſtine* marriages. Theſe were ſo called if contracted without witneſſes, and as it were by ſtealth, without any of the ſolemnities requiſite to the celebration of all lawful marriages. The requiſite ſolemnities were, that the marriage ſhould be propounded by the prieſt, who was to fix a time, within which

[h] Corv. Jus Can. 85 to 102. Launc. Inſt. Jur. Can. lib. 2. tit. 11, 12, 13.

thoſe

CHAP. XXV.
HENRY VI.
EDW. IV.

those who knew any impediment should declare it. The priest, in the mean time, was likewise to examine if there was any impediment, under pain of suspension for three years if he neglected so to do. The consequence of such clandestine marriage was, that the children were all illegitimate: however, the marriage might be made good, and the children legitimated, if it was afterwards approved by the church, or published by the parties [i]. The abuse of clandestine marriages was very early noticed by our provincial synods. It was required by one of our constitutions, that banns of marriage should be previously published, and that no marriage should be celebrated but in a parish-church, or chapel having parochial rights, unless with special licence of the bishop; and any priest assisting at a marriage not so celebrated, was subjected to the penalty of suspension. [k].

The canonists reckon, among others, the effects and consequences of matrimony to be these: that the children born afterwards either are legitimate, or become so. Of the former sort are those born during the marriage; of the latter*, are those born before the marriage, if the parents, at the time, were capable of contracting matrimony: secondly, that they were to cohabit: thirdly, that no simple *donatio inter virum et uxorem* could regularly hold [l].

Of Divorce.

The next point to be considered is *divorce*. This was defined to be, *legitima mariti et uxoris separatio, apud competentem judicem, cum causæ cognitione, et sufficiente ejus probatione factâ*. It was either *tori*, or *vinculi matrimonialis*. In the first instance, there was an interdiction from any cohabitation, or mutual conversation, either for a time, or generally without any mention of time: in the latter, the marriage was intirely dissolved for ever. The causes of divorce of the former kind were, *propter adulterium, propter furorem, propter hæresin, propter sævitiam*.

[i] Corv. Jus Can. 102, 103. Launc. Inst. Jur. Can. lib. 2. tit. 14.
[k] Lynd. 273, 274, 277.
* Vid. ant. vol. I. 265.
[l] Corv. Jus Can. 104. 106.

With

With reſpect to adultery it was held, that if both parties were equally guilty, or the huſband proſtituted the wife, or the huſband was reconciled to his wife after her guilt, it was no cauſe of divorce. The only cauſe of divorce *vinculi matrimonialis*, as laid down by the pious canoniſts, was *propter infidelitatem*, which was when one of the parties became catholic, and would not live with the other, who continued ſtill an unbeliever. But this, tho' the only cauſe of divorce *à vinculo*, was not the only ground upon which a marriage might be diſſolved, for we have juſt been enumerating many impediments which intirely diſſolved the marriage. In caſe of a divorce *quoad vinculum*, the parties were at liberty to marry; but a divorce *à toro* had no ſuch effect, the parties ſtill continuing man and wife. If either party, without a cauſe of divorce, or the judge's authority, declined the conjugal ſtate, he or ſhe might be compelled by an action *ad matrimonium colendum*. If a woman, upon a juſt cauſe of complaint of the huſband's ſeverity, but without a regular divorce, departed from him, ſhe would be reſtored to her huſband, if he demanded her, provided he gave ſecurity for treating her well; but no reſtitution would be made, if the ſeverity was ſuch as could not eaſily be guarded againſt by any ſecurity; and, in ſuch caſe, ſhe would be committed to the cuſtody of ſome diſcreet woman till the deciſion of the cauſe.

THE canon law put a mark of diſapprobation upon *nuptiæ ſecundæ*; for ſo they termed every marriage after the firſt: no benediction could be pronounced, nor could any prieſt be preſent at the celebration of them [m]. Bigamy was ſuch a ſtigma upon a man, as to diſqualify him for receiving orders, even tho' his wife was dead; nor could it be removed by any diſpenſation. But the canoniſts carried the conſtruction of bigamy beyond the contracting of a ſecond marriage. If a man carnally knew a woman who com-

[m] Corv. Jus Can. 108, 109, 110. Launc. Inſt. Jur. Can. lib. 2. tit. 16.

mitted

CHAP. XXV. HENRY VI. EDW. IV.

mitted adultery, if he married a woman repudiated, or a widow, he was conſidered as a bigamiſt, and diſqualified for orders. It was held, that a perſon marrying a woman, who was married to another, but not carnally known by ſuch ſtranger, was not a bigamiſt; nor one who had many concubines, if he had undergone penance, and had been diſpenſed with. The latter therefore was not conſidered ſuch an *irregularity* (for ſo bigamy was termed) as to render a perſon unfit for the duties of the church [n]. The credit that was given by our courts of common law to the biſhop's certificate in caſes of baſtardy and bigamy, has been too often mentioned to need being enlarged upon in this place*.

Such was the law of marriage, as delivered by the canoniſts, and adopted by our eccleſiaſtical courts for their rule, in deciding upon matrimonial cauſes. To theſe it will be neceſſary to add ſome points of a juridical nature relating to marriage, which were peculiar to our own law, and occaſionally had been agitated both in our lay and ſpiritual courts. In our ſpiritual courts we find a ſuit ſpoken of by writers of the next period, called *jactitation of marriage*, and which probably exiſted at the time of which we are now writing. This was a proceeding to clear a perſon of a matrimonial contract, which was pretended to exiſt by the other party. A ſuit, as was before ſeen, might be brought in the eccleſiaſtical court by a man for recovery of his wife, if ſhe was taken from him, provided the action was merely to have poſſeſſion of her; and yet he might alſo have an action of treſpaſs to recover her; and alſo, if the caſe was of that ſort, an action *de uxore abductâ cum bonis viri* [o]. If a man lived ſeparated from his wife, an action might be had in this court to compel him to receive her and cohabit with her; and this proviſion of the canon law, as has juſt been ſhewn, was ſuppoſed to be alſo ſanctioned by an expreſſion in ſtat. 13 Ed. I. c. 34 [p].

Jactitation of marriage.

[n] Corv. Jus Can. 44.

* Vid. ant. vol. I. 466.

[o] Goodall, of the Liberties of the Clergie by the Lawes of the Realme, printed by Rob. Wier, tempore Hen. VIII.

[p] Vid. ant. vol. II. 211.

It

It appears alſo, that goods promiſed with a woman in marriage were demandable in this court, after the marriage celebrated: but upon this had ariſen ſome difference of opinion. We have before ſeen a diſtinction between a contract to give money, if a perſon will take to wife a woman, and a promiſe of money with a woman in marriage; the former being held a temporal matter, the latter ſuch as was proper for this court [q]. It may be doubted, whether the judges were now ſo nice as to make any diſtinction upon the wording or form of ſuch agreements, unleſs they were by deed, and then there was no diſpute but they were purely lay contracts [r]. For in 14 Ed. IV. where the declaration merely ſtated that he had married the daughter of the defendant, and that he ſhould have twenty pounds in reſpect thereof, all the judges of the common-pleas held, that upon the face of it, this was only determinable in the court chriſtian, *being of the ſame nature as the marriage* [s]; and it is collected from the Regiſter, that for marriage money, and penſions, ſuit was invariably to be in the ſpiritual court [t]. Mention is there made of ſuch a ſuit brought againſt the executors of the perſon promiſing, and it being held good, a conſultation was granted [u]. Indeed, this ſeemed to be the ſettled opinion, which prevailed in the two following reigns and long after. On comparing theſe caſes, we find the law as delivered by Bracton at length re-eſtabliſhed and confirmed [x]. It was alſo ſaid, that where a man gave goods with his daughter in marriage, and ſhe was afterwards divorced, he might have a ſuit in this court to recover the goods [y]; but this muſt be underſtood of a divorce for ſome impediment, and not upon the woman's adultery [z].

[q] Vid. ant. vol. III. 65.
[r] 45 Ed. III. 24.
[s] 14 Ed. IV. 6. and 17 Ed. IV. 4.
[t] Reg. 46. 48. Bro. Proh.
[u] Reg. 46. b.
[x] Vid. ant. vol. I. 454.
[y] Vide Goodall.
[z] An Apologie, &c. 25 to 27.

CHAP. XXV.
HENRY VI. EDW. IV.

Of wills and teſtaments.

NOTWITHSTANDING wills, and the adminiſtration of inteſtates' effects, were objects of eccleſiaſtical judicature, theſe were matters of ſuch jealous concern, that the parliament had more than once interpoſed to lay down rules for the government of biſhops in the article of adminiſtration in caſes of inteſtacy. It had been ordained, firſt, that the ordinary ſhould pay the debts of the inteſtate the ſame as an executor[a]; and, ſecondly, that the ordinary ſhould, in ſuch caſe, always grant adminiſtration to the next and moſt lawful friends of the inteſtate[b]. When theſe grand points were adjuſted, the mode of accompliſhing either was left to be ſettled by the eccleſiaſtical juriſdiction. Upon this head ſeveral conſtitutions had been made, one of them ſo far back as the reign of Henry III.

IT was ordained by a legatine conſtitution of cardinal Ottoboni, that no executor ſhould be admitted to the execution of any teſtament, nor ſhould any teſtament be proved by him before the ordinary, according to the eſtabliſhed cuſtom, till he had, if a layman, expreſsly renounced the privilege of his own temporal court. Such was the conteſt in thoſe days concerning the juriſdiction over teſtamentary queſtions, that it was thought neceſſary to bind an executor not to avail himſelf of this difference of opinion. The conſtitution further ordains, that executors, before they received adminiſtration of the effects, ſhould make an inventory in the preſence of credible perſons, who were acquainted with the effects of the deceaſed, and exhibit it to their ſuperior prelate. If any one preſumed to adminiſter before he had made an inventory, he was to be puniſhed at the diſcretion of the biſhop[c]. There are two conſtitutions of *Stephen Langton* on the ſubject of teſtaments made by eccleſiaſtics. By one it was ordained, that no beneficed clerk ſhould leave any thing by teſtament to his concubine; and if he did, that the whole bequeſt ſhould,

[a] Vid. ant. vol. II. 167. [b] Ibid. 387. [c] Conſt. Ottobon. tit. 14.

by

by the biſhop of the dioceſe, be converted to the uſe of the church which the deceaſed perſon held. By the ſecond it was ordained, that religious perſons, as from the deſign of their rule and order they were to have no property, ſo they ſhould not make any teſtament; which was conformable with the rule of the pontifical law [d].

If religious perſons had no property of their own, they were deemed unfit to be truſted with the property of others. It had accordingly been ordained, in a conſtitution of archbiſhop Boniface, in the time of Henry III. that no religious perſons of whatever order ſhould be executors of teſtaments, unleſs by the licence and pleaſure of their ordinary. This was ſoftened by a conſtitution of archbiſhop Peckham in the reign of Edward I. which required that no religious perſon ſhould be executor, unleſs his ſuperior was ſecurity for a due performance of his duty, and for his rendering a faithful and true account of the overplus to the ordinary of the place: and becauſe ſome perſons wearing a religious habit got themſelves to be appointed *diſtributors* of the effects of deceaſed perſons, as if that was not within the proviſions concerning executors, it was now ordained, that the above regulation ſhould apply in both caſes; and any one who, without ſuch ſecurity, intermeddled in the execution or diſtribution of ſuch effects, was made liable to the pain of an anathema; ſo that thoſe who could not give ſecurity, could neither be executors nor diſtributors [e].

Cases

The next legiſlative proviſion on the ſubject of teſtaments, is a conſtitution of archbiſhop *Mepham*, in the beginning of the reign of Edward III. This was to repreſs a grievance which was a ſubject of great complaint during the whole of that king's reign. It ſeems that ordinaries uſed to exact of executors great ſecurities for the inſinuation or proving of teſtaments, and the commiſſion of adminiſtration, in order to extort heavy fees and douceurs.

[b] Lynd. 166, 167. [e] Ibid. 167, 168, 169.

CHAP. XXV. HENRY VI. EDW. IV.

To prevent this in ſome degree, it was ordained, that for the inſinuation of a will of a poor man, the inventory of whoſe goods did not exceed one hundred ſhillings ſterling, nothing at all ſhould be demanded[f].

ANOTHER conſtitution made by archbiſhop Boniface in the reign of Henry III. was revived, and re-enacted by archbiſhop Stratford in the reign of Edward III. Complaint had then been made, and the ſame cauſe continued in the latter reign, that where perſons, whether clergy or lay, died inteſtate, the lords of fees did not permit the debts of the deceaſed to be paid out of their moveables, nor diſtribution to be made by the ordinary to the uſe of the wife, children, relations, or others, in ſuch proportion as was due to each, according to the cuſtom of the country. Others, again, prevented perſons who were *adſcriptitii*, and of ſervile condition, and women, whether married or ſingle, from making their wills; all which was ſtated to be in violation of the uſage of the church hitherto approved, as well as an offence to the Divine Majeſty, and the eccleſiaſtical law. Such are ſtated to be the abuſes which now prevailed on this ſubject. For the correction of them it was now ordained, that all perſons in ſuch caſe offending ſhould be involved in a ſentence of the greater excommunication. It was further provided, that when a teſtament had once been proved and approved before the ordinary of the place, it ſhould not be required to be proved and approved before any layman, unleſs by reaſon of any lay fee which might be bequeathed in ſuch teſtament. It was enjoined, that none ſhould preſume to prevent the effect of any teſtament or laſt will, where a bequeſt was warranted either by particular cuſtom, or the general law. All offenders in the above caſes were declared to be involved in a ſentence of the greater excommunication.

[f] Lynd. 170.

THE

THE article of inventories was again provided for in this conſtitution. It was ordained, that adminiſtration ſhould not be granted to an executor, till a faithful inventory had been made of all the goods, with an exception only of the funeral expences, and thoſe of making ſuch inventory. The time of delivering this inventory was left to the diſcretion of the ordinary. Farther, it was provided, as had been before done in the caſe of religious perſons, that after the will was proved, the adminiſtration ſhould not be committed but to ſuch perſons as were able to give a good account of their adminiſtration; and, if neceſſary, give good ſecurity, and make faithful promiſe ſo to do, whenever they ſhould be required by the ordinary. As to religious perſons, they were not to be executors without the permiſſion of their ordinaries. It was alſo enacted, that out of the portion that belonged to the dead man, the church ſhould receive its accuſtomed due; meaning the *mortuary* that was due by the cuſtom of ſome places.

Executors.

To prevent all pretences that might be made uſe of to embezzle the effects of the deceaſed, it was ordained, that no executor ſhould appropriate any goods of the deceaſed under title of a ſale, or by any other pretence, unleſs a gift of them had been made by the teſtator *inter vivos*, or by will; or they were given to him by the direction of the ordinary for his trouble; or any debt was owing to him from the deceaſed; or they were taken as a moderate compenſation for the expences of the adminiſtration. If he had none of theſe excuſes, a perſon appropriating any goods of the deceaſed, would be ſuſpended *ab ingreſſu eccleſiæ*; nor ſhould be abſolved till he had reſtored the things ſo unjuſtly appropriated, and double the value out of his own goods to the fabric of the church to which the deceaſed belonged g.

g Lynd. 171 to 179.

THE

CHAP. XXV.
HENRY VI.
EDW. IV.

THE liberty taken with the goods of deceaſed perſons was a matter of great ſcandal to the church, and great oppreſſion to the people, and was much complained of during the reign of Edward III. In the 16th year of that king, the extent of this evil is thus ſtated in the preamble of a conſtitution by archbiſhop Stratford. It recites, that ſome eccleſiaſtical judges would not permit the executors of deceaſed perſons to diſpoſe of their goods according to the direction of their teſtators, and the ſanctions both of the law and the canons; that they took to themſelves the moveables of teſtators, and of inteſtates (which after the payment of debts ſhould be applied to pious uſes); and ſo ſometimes diſtributed them at their pleaſure, both excluding the deceaſed and their creditors: in conſideration whereof many perſons, when ſick, uſed to alien their moveables, ſo that churches were defrauded; and creditors, children, and wives, who by law and cuſtom ought to have their ſhares, were deprived of their due[h]. Such were the abuſes; and the remedy provided for them was as follows. It was ordained, that biſhops and other eccleſiaſtical judges ſhould not intermeddle in effects of teſtators, except ſo far as the law permitted, under any pretence whatſoever, but ſhould freely permit the executors to diſpoſe of them; and it directs that they ſhould diſtribute the goods of inteſtates in this manner: ſuch as remained after payment of debts, were to go *ad pias cauſas, et perſonis decedentium conſanguineis, ſervitoribus, et propinquis, ſeu aliis, pro defunctorum animarum ſalute*; and the ordinary was to retain nothing to himſelf, except, perhaps, ſomething reaſonable for his trouble, under pain of ſuſpenſion *ab ingreſſu eccleſiæ*[i]. The proviſions of this conſtitution did not yet remedy the evil: inſtead therefore of calling again upon the ordinaries to fulfil the duty hereby enjoined, it was judged a better regulation to remove the adminiſtration intirely

[h] Johnſ. Canons, *ad annum.* [i] Lynd. 179, 180.

out

out of their hands; which was done, as we have ſeen, by ſtat. 31 Ed. III. which commands the ordinary, in caſe of inteſtacy, to depute *the next and moſt lawful friends* of the inteſtate to adminiſter his goods [k].

By another conſtitution of the ſame archbiſhop, the fees to be paid in caſes of wills were fixed. It was ordained, that for the proving, approving, or the inſinuation of a will, nothing ſhould be taken by biſhops or ordinaries; but to the clerks, a certain reward for their trouble was to be paid. The particular ſums to be paid for inſinuation, inventory, acquittances, for hearing the account, are preſcribed by this conſtitution in proportion to the value of the effects; if any one took more, he was, within a month, to pay double the value to the fabric of the church of the place; if he neglected ſo to do, the offender being a biſhop, was to be ſuſpended *ab ingreſſu eccleſiæ*, if an inferior, *ab officio et beneficio*, till he complied. It was alſo ordained, that no acquittance ſhould be made to an executor, till he had given a true account of his adminiſtration, under pain of ſuſpenſion *ab ingreſſu eccleſiæ* for ſix months [l].

Such were the proviſions made, at different times, by the eccleſiaſtical legiſlature, upon the ſubject of wills and inteſtacy. Both theſe articles are very fully conſidered

[k] Vid. ant. vol. II. 387.

[l] Ibid. 181, 182, 183. There is a proviſion among the legatine conſtitutions of cardinal Ottoboni, which commands the practice of diſtributing the goods of inteſtates *in pios uſus*, and directs that biſhops ſhould make diſtribution according to a ſtatute made by the prelates, with the approbation of the king and barons; meaning, as it ſhould ſeem, that ſome ſtatute had been made to warrant ſuch diſtribution *in pios uſus*. This conſtitution was made in 52 Hen. III. *John de Athona* in his gloſs on this paſſage ſays, that the ſtat. Weſtm. 2. 13 Ed. I. c. 19. which requires the ordinary to pay the debts of the inteſtate, as an executor ſhould, was the ſtatute here meant; which anachroniſm is very ſingular in a writer who lived ſo near the period. Biſhop Gibſon confeſſes he cannot diſcover what ſtatute is here alluded to. It is not eaſy to ſuppoſe, that the proviſion of *Magna Charta* is here meant. Vid. ant. vol. I. 244. and the references there made. Leg. Conſt. Ottoboni. tit. 14. John de Athona, *ad locum*.

by

CHAP. XXV.
HENRY VI.
EDW. IV.

by our two canoniſts *Lyndwood* and *John de Athona*, from whoſe gloſſes we are to collect what were the opinions prevailing in the clerical courts reſpecting theſe two objects of eccleſiaſtical cogniſance. With the aſſiſtance of theſe writers, we ſhall be able to acquaint the reader with the law upon this head. We ſhall begin with *wills*.

Of the forms of wills, &c.

It ſhould firſt be obſerved, that *wills* were of two kinds; that is, *teſtamentum*, and *ultima voluntas*; and all the foregoing conſtitutions make uſe of both theſe terms, ſo that their regulations are applicable to both. The doctors, however, made a difference between them. The former was a more ſolemn act, attended with all the forms preſcribed in ſuch caſes by the law books: if any of theſe forms were wanting, it was not a teſtament, but a mere declaration of the *ultima voluntas*. A *codicil* alſo might go under this title: thus, in our eccleſiaſtical law, a *teſtament* and a *laſt will* ſeemed to be nearly the ſame thing in effect [m]; and we ſhall accordingly uſe the word *will*, without any reference to a diſtinction between that and a teſtament.

We have ſeen, that the right of wives and of perſons *adſcriptitii*, and others *ſervilis conditionis*, (meaning, probably, ſuch as held by villain tenure, though not villains themſelves) to make wills, was vindicated by a conſtitution of archbiſhop Stratford. This conſtitution is ſupported by Lyndwood, who lays it down, that all perſons may make wills, except thoſe who come under any of the following deſcriptions: firſt, thoſe who had no ſufficient authority, as ſons, actual villains, monks, hoſtages; ſecondly, thoſe not having ſufficient underſtanding, as an infant, madman, *mente captus*, and prodigal; thirdly, thoſe who had not ſufficient ſenſes, as the blind, deaf, and dumb; fourthly, thoſe condemned to death or to baniſhment; and, fifthly, thoſe whoſe true ſtate and condition

[m] Lynd. 173. h.

was

was not known. Such perſons are allowed by Lyndwood to be properly excepted by all the doctors from the privilege of making a will; but as a married woman is not mentioned among theſe exceptions, he expreſſes great aſtoniſhment, that in his time huſbands endeavoured to prevent them from making wills; and he combats this poſition with great earneſtneſs.

As to the objection that wives have *nulla bona*, no goods of which to make a will, but that they all belonged to the huſband, ſo that ſhe could not make a will without his permiſſion; he ſaid, that this might, indeed, hold as far as concerned the huſband's own goods, (though there were ſome doctors who thought the married ſtate gave the wife dominion over her huſband's goods), and he admitted that his permiſſion was neceſſary to her making a will of any part of *them*. But he contends, that there was a diſtinction, which made certain goods the property of the huſband, and others the property of the wife; for, ſays he, the prohibition which prevented any gifts between man and wife[o] during the marriage, could have no application, unleſs they had diſtinct goods: the ſame may be ſaid of the rule of the canon law, that goods produced from the goods of the huſband and wife ſhould be divided equally when the marriage ceaſed, and that rule which gave the wife's portion back to her upon the diſſolution of the marriage. He admits, however, that the huſband had power over the wife's portion, and that what was gained by the wife during the marriage, was preſumed to be gained out of her huſband's goods, and ſhe clearly could not bequeath them. Theſe reſtraints, therefore, upon the wife were, where it did not appear whence ſhe had made her acquiſitions; and he ſeems to think, that where a rich woman married a poor man, and the acquiſitions of the wife could not be ſuppoſed to be made out of his pro-

[o] Vid. ant.

perty,

CHAP. XXV.
HENRY VI.
EDW. IV.

perty, ſhe would not be reſtrained from making a will without her huſband's conſent. He ſeems to think, that the poſition which made a huſband maſter of his wife's property was true *in dotalibus*; but this held only *quamdiu bene adminiſtrat*; and ſo long as he was not ſuſpected, nor declining in his circumſtances, he was maſter ſo as to adminiſter them. But though he was *dominus in dotalibus*, he lays it down peremptorily that he was not ſo *in rebus paraphernalibus*; for theſe belonged to the wife even during the marriage, and ſhe might freely make a will of them without the huſband's conſent. The *bona paraphernalia* are defined by Lyndwood to be, *quæ uxor habet extra dotem* [p]. If we refer to the judgment of the common law, we find it laid down, that a wife might, with the licence of her huſband, make executors; but his agreement was conſidered as neceſſary to make the will good: ſhe might alſo make her huſband executor to her will [q].

NEXT to the *teſtator*, we ſhould conſider the ſituation of the *executor*, whom he deputes to execute the will he has made. Many points of law concerning the duty and character of executors are agitated by *John de Athona*, in his famous gloſs on a conſtitution of cardinal Ottoboni [r]. We learn from him, that a minor of ſeventeen years old might be an executor by a particular cuſtom, though not by the canonical law. It was by cuſtom alſo, that a woman might be made an executor. It was a point much debated among the canoniſts, whether an executor was compellable to take upon him the truſt; and ſome had held that he was, becauſe it was a public duty, and a public duty every one was bound to diſcharge. But this opinion is thought by our gloſſiſt to apply to what he calls *executor legitimus*, and not to a teſtamentary executor, who certainly was at liberty to decline; becauſe no man could impoſe a duty on another beyond the benefit he received: though when

[p] Lynd. 173. b. [q] 4 Hen. VI. 31. 39 Hen. VI. 27. [r] Tit. 14.

once

once he had undertaken ſuch duty, he might be compelled by eccleſiaſtical cenſures to fulfil it. Another queſtion among the canoniſts was, whether when there were more than one executor, they were all to concur in being *actor* or *reus* in an action, or in making an agreement. If they were conſidered in the light of procurators, as ſome held, they could not act alone; but others held, they were rather in the nature of tutors and curators to minors in the civil law, and then each might act ſingly for the reſt. This latter was the opinion of John de Athona, who ſays, the cuſtom of the realm was ſuch in the temporal courts in his days; though he admits, that in judicial matters it was neceſſary for them all to join.

ANOTHER queſtion was, whether ſuch action as an executor had againſt his teſtator, was extinct by the executorſhip. Some thought that it was; others that it was not, conſidering there was an heir againſt whom an action might be brought: though if there was no heir, it was the opinion of our gloſſiſt, that the executor might, without any breach of truſt, openly take what was owing to him; and he adds, that any legacy left to him, ought not to deprive him of his *actio funeraria*. After this, there could be no doubt, as it was with ſome of the foreign canoniſts, whether any and what action could be brought by an executor; diſtinguiſhing between a *nudus executor*, and one who had an intereſt. It was held, that every executor might bring all actions that related to the adminiſtration of the laſt will; and if he omitted to bring ſuch as were neceſſary, the dioceſan might. Similar to the laſt was the queſtion, whether an executor might come to a compromiſe or make any agreement with the heir or any debtor of the teſtator. Some thought he could not remit a debt any more than a *procurator ad agendum*, unleſs, perhaps, with the conſent of the legatees and creditors, who were materially intereſted; or he had a ſpecial authority from the teſtator ſo to do. Others thought, that as it might be paid

CHAP. XXV. HENRY VI. EDW. IV.

paid to him, and he might bring an action for it, especially if he was deficient in proofs and a suit would be hazardous he might compromise a debt.

In the time of John de Athona it was a question, whether an executor should give security for a due administration; and then a distinction was made between a testamentary executor, and one appointed by the ordinary who was called *legitimus*; and it was held, that the former need give no security: but we have seen, that by later constitutions, executors of every kind were required to give security[s]. He also examines, whether, in giving an account of their administation, it was sufficient to verify what they did upon their oaths; which points we shall consider presently. When an action was brought, either by creditors or by legatees, against an executor, they were not bound to shew the sufficiency of the property to satisfy their demands, but that was to be presumed till the contrary was shewn by the executor. Another question in the time of John de Athona was, whether an executor might buy any goods belonging to the testator; but this was afterwards settled in the negative by constitutions before mentioned[t]. As to the point, whether the heir or the executor should be proceeded against by a creditor or legatee, it was held by some, that the heir should; by others, that it should be the executor, in all cases of demands on the moveables; but our glossist says, that this must, after all, lie in the option of the claimant[u].

Of probate.

When the will was made, and the executor appointed, then was the authority of the bishop necessary to carry it into execution. The bishop's authority applied to these points; the proof and insinuation of the will, the making an inventory, the committing of administration to the executors, and, lastly, the demanding of the executor an

[s] Vid. ant. 69.
[t] Vid. ant. 69.
[u] John de Athon. in Const. Ottoboni, tit. 14. *per totum.*

account

account of his adminiſtration[x]. The regular courſe was, that the proof of a will ſhould be before the ordinary of the place where the teſtator died; and formerly, when a perſon had effects in more dioceſes than one, they contented themſelves with one probate; but the ordinary of each dioceſe was to give adminiſtration of the goods within his dioceſe, and was to call the executor to account. Thus ſtood the practice in the time of Edward I. as appears by the conſtitution of cardinal Ottoboni, and the gloſs of John de Athona thereon, ſo often referred to. But at the time of which we are now writing, a different practice had obtained; for we are informed by Lyndwood, that the archbiſhop of Canterbury, in his province, took to himſelf, as well the proof and inſinuation of all wills, as to commit the adminiſtration of the goods, and to call the executors to account, in all caſes, where the teſtator had *bona notabilia* in different dioceſes within his province. This prerogative of the archbiſhop had given riſe to much argument on the meaning of *bona notabilia*; and Lyndwood, upon the authority of conſtitutions, of doctors, and of reaſon, takes upon him to pronounce *bona notabilia* to be ſuch, whoſe poſſeſſion would exempt the owner from the deſcription of *pauper:* but, proceeds he, one who has leſs than one hundred ſhillings ſterling is *a pauper*; from whence he concludes, that one having leſs than one hundred ſhillings had not *bona notabilia*[y].

THE probate of the will is ſpoken of under different terms by our great canoniſts; the *probatio* or *publicatio*, and the *approbatio* or *inſinuatio*; the two former denoting the act of the executor; the two latter, that of the biſhop. The will of the deceaſed perſon was required to be *proved* by two witneſſes who were *omni exceptione majores*. When that was done, the eccleſiaſtical judge was to give his *approbation* to the proof[z]. It was only in

[x] Lynd. 179. t. [y] Ibid. 174. [z] Ibid. 174. f. g h

reſpect

CHAP. XXV. HENRY VI. EDW. IV.

reſpect of the *bona*, or moveables and perſonalty, that a will became the object of cogniſance to the eccleſiaſtical judge; he pretending no claim over a deviſe of a lay fee; but if a will contained both, it was neceſſary that it ſhould be approved by the ſpiritual judge.

THE making of an inventory, which was the next ſtep, and was ſo earneſtly preſſed by the abovementioned conſtitutions, was as requiſite for the ſecurity of the executor as of the effects; for it had become a rule of the canoniſts, that where a perſon intermeddled in the adminiſtration without having made ſuch an inventory (except for the expences of the funeral, the probate and inventory, and the neceſſary preſervation of the property), a preſumption was raiſed of ſufficient aſſets, and he was bound to anſwer to every one of the creditors [b]. If no inventory was made, the acts of the executor were ſtill valid; but he might be removed, as a ſuſpected perſon, by the ordinary [c]. It is ſaid by Lyndwood, that debts which were not ſecured by ſome inſtrument or obligation, need not be inſerted in an inventory till they were received [d].

THE *ſufficiens cautio*, which was required by the above conſtitutions, created ſome doubts among the canoniſts; for a *ſufficiens cautio* might be of three kinds: it might be either *pignoratitia*, *fidejuſſoria*, or *juratoria*; and it ſeems to have been left to the diſcretion of the ordinary which of theſe he would take. If a perſon was ſuſpected, he would be required to give one of the two former; if he was a credible perſon, the latter was ſufficient [e]. Another conſideration which weighed in this point, was the ſituation of the executor: if he derived any benefit under the will, he was to give one of the former ſecurities; but if he was a mere *nudus executor*, he was not required to give either of the higher ſecurities. Another conſidera-

[b] Lynd. 176. p.
[c] Ibid.
[d] Lynd. 168. h.
[e] Ibid. 169. a.

tion

tion ſeems to have been, whether he was a teſtamentary executor or appointed by the ordinary, and ſo called *legitimus*; for the former, being a perſon entruſted by the teſtator, ought not to be ſuſpected by the ordinary; and therefore the latter ſecurity of an oath was thought ſufficient in ſuch caſe; nor was that to be required till the adminiſtration was completely finiſhed [h].

After the ordinary had committed adminiſtration, he might remove the executor, if there was any ſuggeſtion of fraud and miſmanagement of the effects [i], or if he could not give a good account of his adminiſtration. In taking an account, the biſhop ſeems to have had the ſame diſcretion as in taking caution for a due adminiſtration. According to the character and circumſtances of the parties, he might require a *plena probatio*, or content himſelf with the oath of the executor; and as to the account, he might require it to be more or leſs particular [k].

In giving a true account of his adminiſtration, it muſt ariſe very often that the executor would have a reſiduum, either by reaſon of legatees dying before the teſtator, or by reaſon of the effects exceeding the diſpoſitions made in the will. In ſuch caſe, the law is thus laid down by Lyndwood: if the executor was a *nudus miniſter*, who was to have no benefit, he could not apply this reſidue to his own uſe; but where the executors, ſays he, are *executores univerſorum bonorum*, ſuch perſons being *in loco hæredum*, were to take every thing that was undiſpoſed of by the teſtator; and yet, ſays he, ſuch an executor would do well, if he diſpoſed of the overplus by the advice of the ordinary [l]. In the other caſe, the teſtator would be conſidered as dying inteſtate with regard to ſuch undiſpoſed property.

Of inteſtacy.

The conſequences of inteſtacy were not much better aſcertained than they were before the ſtat. 31 Ed. III.

[h] Lynd. 170. h. [i] Ibid. 177. g. [k] Ibid. 168. l. [l] Ibid. 179. e.

The

CHAP. XXV.
HENRY VI.
EDW. IV.

The difference merely was, that inſtead of truſting to the diſcretion of a biſhop for diſtributing the effects *in pios uſus*, the adminiſtration was to be committed to the next and moſt lawful friends of the inteſtate, who were to adminiſter, and diſpend them for the ſoul of the deceaſed [m]. The text, therefore, of the canon law was ſtill the rule by which the adminiſtration was to be governed; and we muſt recur to our provincial conſtitutions to learn what was ſuch an application of the property as might be ſaid, according to the notions of theſe times, to be for the benefit of the deceaſed perſon's ſoul. The conſtitution of archbiſhop Stratford abovementioned directs that the goods of an inteſtate which remained after the payment of debts, ſhould be diſtributed *ad pias cauſas, et perſonis decedentium conſanguineis, ſervitoribus, et propinquis, ſeu aliis, pro defunctorum animarum ſalute.*

Of pious uſes.

THE interpretation put upon *piæ cauſæ* by the canoniſts was extenſive. We are informed by Lyndwood, that any perſon who was an object of compaſſion; an orphan, widow, or pauper deſtitute of ſupport from himſelf; thoſe rendered infirm by diſeaſe or age, being alſo poor; all ſuch were objects that came under the deſcription of *piæ cauſæ*. They alſo reckoned under the ſame head, the watching of a city, the repairing of bridges, roads, walls and ditches of a city or caſtle, and the like, particularly in caſes of neceſſity. To theſe they added, as might be expected where churchmen were the interpreters of the law, the ornaments and fabric of churches, lights, anniverſaries, and incidents relating to divine worſhip: gifts *pro emendandis forefactis*, and *pro malè ablatis*, were deemed of the ſame kind. In general, any thing given *pro animâ*, was judged to be of this deſcription; and yet a gift to a father or mother *pro animâ*, was not ſo eſteemed unleſs they were poor [n].

[m] Vid. ant. vol. II. 387.

[n] Lynd. 180. d.

THE

THE *piæ cauſæ* being ranked as the firſt objects of conſideration in this conſtitution, it ſhould ſeem as if nothing was to go to the *conſanguinei*, and the others there mentioned, till ſome portion had been firſt beſtowed on ſome of theſe righteous purpoſes. After theſe follow the *conſanguinei*, the *ſervitores*, the *propinqui*, and *others*. The church had laid down to itſelf a different rule for the diſtribution of the effects of a layman and a clerk, and of a beneficed and non-beneficed clerk. If a beneficed clerk died inteſtate, the goods which accrued to him by means of his benefice were, by the canon law, to go to the ſucceſſor; thoſe that had become his property on other perſonal conſiderations, were to go to the *conſanguinei*, and, upon failure of them, to the church. The ſame of a clerk not beneficed; only proviſion had been made in the early times of Chriſtianity, that the widow ſhould come in after the *conſanguinei*, and before the church. In caſe of laymen inteſtate, upon failure of the *conſanguinei* and the widow, the *fiſcus* was to ſucceed. The manner in which the *conſanguinei* were to be reckoned, is thus laid down by Lyndwood. The firſt conſideration, ſays he, in the ſucceſſion *ab inteſtato*, is that of the children; the ſecond, of the aſcendants, with ſome collaterals, if any are extant; the third, of the tranſverſe line; the firſt two being extended *in infinitum*; the third only as far as the tenth degree, whether *agnati* or *cognati*. Upon failure of theſe, and not till then, if there was any widow of the deceaſed, ſhe was to ſucceed; and after her the *fiſcus* [o]. The portion to the *ſervitores*, was to be according to their ſeveral merits. *Propinquus* might be underſtood either of blood or neighbourhood, and the *others*, according to Lyndwood, muſt be poor perſons; who having before been reckoned among the *piæ cauſæ*, were thus doubly provided for [p]. The whole of the effects was to be diſtributed in the above way; formerly by the ordinary

[o] Lynd. 180. f.

[p] Ibid. 180. h, i, k.

CHAP. XXV.
HENRY VI.
EDW. IV.

(without reſerving any thing to himſelf), but ſince the ſtat. 31 Ed. III. by the next and moſt lawful friends, in ſuch proportion to each of thoſe objects, as ſeemed good to the perſon diſtributing. It is made a queſtion by Lyndwood, whether under the deſcription of *conſanguinei* or *propinqui*, any thing could be demanded *de jure* by baſtards and ſpurious children; which he anſwers himſelf in the negative: but he thinks they ought to be conſidered under the light of poor perſons, and ſhould be provided for *per viam eleemoſynæ* [q].

SUCH was the rule of the eccleſiaſtical law reſpecting the diſtribution of inteſtates' effects, if that can be called a rule which was no direction, and that law which had no ſanction to enforce it; for the proportion to be aſſigned to each of the objects intended to be benefited, is no where aſcertained. This was to depend, firſt, on the diſcretion of the adminiſtrator; and, ſecondly, on that of the biſhop, to whom he was to be accountable; and the perſon who was to be intruſted with this charge, was to be choſen by the biſhop, under no other reſtriction than that of being next and moſt lawful friend of the deceaſed. It cannot likewiſe but be remarked, that the poſtponing of the widow to the deſcendants and aſcendants *in infinitum*, and to the *agnati* and *cognati* as far as the tenth degree, was a very inequitable and unjuſt diſpoſal of the huſband's property, and could hardly be palliated by the probability of his having lands, out of which ſhe would be intitled to dower.

The *rationabilis pars.*

THE correction of theſe inconveniences was to be ſought elſewhere. In different parts of the kingdom particular cuſtoms prevailed, which controuled the general law of inteſtacy. The cuſtom of a province, of a county, of a city, of a diſtrict, was to be found in numberleſs places, and the property of deceaſed perſons was thereby divided

[q] Lynd. 189. o.

with

with more certainty, and with leſs interference and diſcretion of ſtrangers. In ſome places it was the cuſtom, if the deceaſed left a wife and no children, that half of the goods were conſidered as the part of the deceaſed, and the other half went to his wife; the ſame if he left only children; if a wife and children, then a third belonged to the deceaſed, and the other two-thirds to the wife and children; if there was no wife, nor children, then the whole belonged to the deceaſed. In ſome the wife took all; in others, the children: and when goods were in places where different cuſtoms prevailed, they were to be diviſible according to the cuſtom of the place where they were reſpectively found [r]. If no diſpoſition was made of the deceaſed perſon's third, or half, as the caſe might be, that alſo became ſubject to a like diviſion, according to the cuſtom.

Of all theſe cuſtoms, that which gave a third to the wife, another to the children, and a third to the deceaſed, and in caſe of only a wife, or only children, the half, was moſt frequently met with; and it ſeems to have ſo generally pervaded the kingdom, as to be miſtaken for the general law of inteſtacy. Indeed this claim of the wife and children, where it prevailed, had been carried ſtill further: it had been conſtrued to be ſuch an inherent right in them, as to reſtrain the power of diſappointing them of this *reaſonable part of the goods* by will; the poſſeſſor, it was contended, having a power of diſpoſing by will of nothing but his portion, or *dead man's part*.

We have before had occaſion to relate the diſcuſſion that this claim, at different times, raiſed in our temporal courts [s]. The queſtion had all along been, whether this was a common-law right, or one ſupported only by the ſpecial cuſtom of different places; and the laſt determinations in the reign of Edward III. ſeem to countenance the latter opinion. Conformably with thoſe deciſions, we

[r] Lynd. 172. l. m. 178. a. [s] Vid. ant. 67, &c.

CHAP. XXV.
HENRY VI.
EDW. IV.

find an action in the reign of Henry VI. [t] and another in the reign of Edward IV. [u] againſt an executor for a reaſonable part, where a ſpecial cuſtom of a county is alledged. There is an inſtance of one action, which was grounded upon the uſage generally, without ſtating it to be of the realm, or of any county or place [x]. If we look a little further on in our juridical hiſtory, we find it laid down poſitively by Fitzherbert and others, in the reign of Henry VIII. that this claim of the wife and children was by the common law that prevailed through the whole realm; and that the action *de rationabili parte* might be maintained againſt the executors [y]; ſo that the power of making a will was, in caſe of leaving a wife or children, confined to the dead man's part. This opinion ſeems to be ſtrenuouſly maintained by Brooke, ſome time after the reign of Henry VIII. Thus ſtood this queſtion about ſucceſſion to perſonal property, whether in caſe of a will or inteſtacy, in the reigns of Edward VI. and Queen Mary, and for ſome years after.

BEFORE we leave the ſubject of wills and inteſtacy, it will be proper to lay before the reader ſuch few notices on the point of juriſdiction, as are to be found in the books of common law. And firſt with regard to executors, and the ſuits they might bring, or be liable to, we find it very early laid down, that a man could not generally ſue an executor in the ſpiritual court for the teſtator's debt; yet if the teſtator enjoined the executor to pay ſuch debt, then he might ſue for it in the ſpiritual court, becauſe of the injunction and promiſe: and this was conſidered as law, ſo low down as the reign of Henry VIII [z]. An executor might ſue another in this court for the teſtator's goods: as where goods were bequeathed, and a ſtranger obſtructed him

[t] 28 Hen. VI. 4.
[u] 7 Ed. IV. 20, 21.
[x] 30 Hen. VI. 95. Bro. Racion. Part. 7.
[y] Bro. Racion. Part. 6.
[z] 6 Hen. III. Fitz. Proh. 17. and vid. Goodall, &c.

in

in beſtowing the legacy, the executor might ſue him in this court [a]; but if the goods bequeathed were taken from the executor, he muſt bring treſpaſs, and could not ſue in this court [b]. So generally was it ſettled that legacies ſhould be ſued for in this court, and not in the temporal, that if a termor bequeathed his crop, this court would hold plea of it [c]. Where one ſued in this court for goods deviſed, which another claimed by deed of gift, and thereupon brought a prohibition, it was held, that being a legacy, it could only be determined in this court [d]. Conſidering the legatee had ſuch action, it was held, that he could not take the goods without the executor's conſent [e]; beſides, the law did not oblige the executor to pay them, till the debts of the teſtator were paid [f]. But where land was deviſed, the deviſee might enter immediately, as he had no ſuit to demand it in the ſpiritual court [g]. If any thing was bequeathed for the reparation of the fabric of a church, the executors might be ſued in this court [h].

THE article of tithes has not hitherto been mentioned in any other way than as an object of judicial cogniſance, which was at different times diſputed between the temporal and ſpiritual courts [i]. It is only once that we were called upon to notice the nature of this proviſion for the clergy, and this was on the occaſion of the ſtatute of *ſylva cædua* [k]. In no other inſtance had the legiſlature thought it neceſſary to interpoſe for ſettling queſtions of tithe; and our temporal courts had no authority to preſcribe any rules on this head. The deciſion, therefore, to aſcertain "what was tithe, and what not," remained wholly with the ſpiritual court, and the clerical legiſlature. The nature of tithes, in this country, muſt be collected from the conſtitutions of

Of tithes.

[a] 4 Hen. III. Fitz. ibid.
[b] 2 Ric. III. 17.
[c] 37 Hen. VI. 9. 8 Hen. III. Fitz. Proh. 19.
[d] 46 Ed. III. 32.
[e] 20 Ed. IV. 9.
[f] 2 Hen. VI. 15.
[g] Vid. ant. vol. I. 455.
[h] Reg. 48. b. Vid. An Apologie, &c. 22, 23, 24.
[i] Vid. ant. vol. I. 70.
[k] Vid. ant. vol. II. 388.

provincial

CHAP. XXV.
HENRY VI.
EDW. IV.

provincial ſynods, the volumes of the canon law, and the opinions of learned doctors. To theſe we muſt now reſort; and we ſhall, with the aſſiſtance of our countryman Lyndwood, lay before the reader what appears to have been the opinions on this ſubject, which prevailed in our eccleſiaſtical courts during the reigns of Henry VI. and Edward IV.

THE text of our law of tithes is chiefly compriſed in three conſtitutions of the time of Edward II. Theſe were made by *Robert Winchelſey*, archbiſhop of Canterbury, in different ſynods held for his province. The firſt of theſe is ſtated, at the opening of it, to be for preventing diſputes, and for rendering the claim of tithes uniform thro' the whole province. It ordains, that the tithe of fruits ſhould be paid in full [l], without any deduction for the expence of raiſing them, or any diminution whatever: the ſame of the tithe of fruits of trees, the tithe of all ſorts of ſeeds, and the tithe of herbs in gardens, unleſs any adequate [m] compoſition was made for them. It declares, that tithe ſhould be demanded of hay, whereſoever it grew, whether in large meadows or ſmall, or even in the highways. The tithe of lambs was ordered in this way: if the number was ſix or leſs, ſix *oboli* were to be given by way of tithe; if they were ſeven, the ſeventh was to be given as a tithe, and the parſon was to return three *oboli* to the perſon paying it, as a compenſation to reduce the tithe to a fair tenth; if there were eight, the parſon was to have the eighth, and give only a denarius as a compenſation; if nine, the parſon had the option to take the ninth, and give one *obolus* * to the pariſhioner, or to wait till the next year, when he might have his tenth lamb. The parſon ſo waiting was allowed to take the ſecond or third lamb, at leaſt, of the ſecond year, in conſideration of his

[l] *Integrè.*

[m] The word in the original is *competens.*

* Theſe are the terms in the conſtitution; and I do not pretend to ſolve the difficulties there are in the Latin names for our old money.

forbearance

forbearance in the firſt year. The ſame rule which was here laid down about lambs, was directed to be obſerved in caſe of the tithe of wool. But if ſheep were fed during winter in one place, and during ſummer in another, the tithe was to be apportioned. In like manner, if in the interval between thoſe ſeaſons any one bought or ſold ſheep, and it was certain from what pariſh they came, the tithe of ſuch ſheep was to be apportioned as the tithe of a thing which had two domicils: if the former pariſh was not known, then that pariſh within which they were ſheered was to have the whole of the tithe.

It was required that tithe ſhould be paid of milk; that is, of cheeſe in the ſeaſon for making cheeſe; and of the milk itſelf in autumn and winter, when it was not uſual to make cheeſe. But for theſe the pariſhioners might make an adequate compoſition, which was always to be to the value of the tithe, and in favour of the church. Tithe was required to be paid of the produce of mills; of paſture of all ſorts [n], as well that which was not common as that which was, according to the time and the number of them. Tithe was required of fiſheries and of bees, and of all other goods which were juſtly acquired, and were renewed annually. Perſonal tithes were alſo to be demanded of artificers and merchants for the gains of their trade, and of all workmen receiving a certain ſtipend; unleſs the ſtipendiary choſe to contribute ſomething in certain for the uſe or ornament of the church, and the parſon conſented to accept it [o].

The foregoing proviſion about the tithe of wool ſeems to have not ſufficiently obviated the difficulties that followed upon the removal of ſheep from one paſture to another. To aſcertain this more minutely, it was provided by a ſubſequent conſtitution of the ſame prelate as follows:

[n] The words in the original are *de paſturis et paſcuis*, which are paſtures of different kinds, in the conſtruction of the canoniſts; the latter ſignifying paſture for ſheep, in places not cultivated nor ploughed; the former, all ſorts of paſture.

[o] Lynd. 191 to 196.

The

CHAP. XXV. HENRY VI. EDW. IV.

The tithe of wool, milk, and cheeſe, was to be fully paid to the church of the pariſh where the ſheep were continually fed and couched, between the time of ſheering (which was after the middle of May, and before the middle of June and the feaſt of St. Martin), although they were afterwards removed into another pariſh, and there ſheered: and to be certain of this payment, the ſheep were not to be removed till ſecurity was given to the parſon for payment of the tithe. If they were removed within thoſe times to another pariſh, each church was to receive a proportion of the tithe, according to the portion of time; provided that no account ſhould be taken of any ſpace of time leſs than thirty days. This proviſion muſt be conſidered as applying only to the tithe of wool, that of milk and cheeſe being to be received inſtantly at the pariſh where the ſheep were fed and couched. Again, if the ſheep fed in one pariſh, and couched in another, the tithe was to be divided between the two churches. If after the feaſt of St. Martin ſheep were carried to other paſtures, and till the time of ſheering were fed in one or ſeveral pariſhes, either in the paſtures of their owners or of others, it was ordained, that the feeding ſhould be eſtimated according to the number of ſheep, and tithe ſhould be demanded of the owners according to ſuch eſtimation.

THE tithe of milk and cheeſe from cows and goats, was to be paid where they fed and couched; and if they fed in one pariſh and couched in another, the tithe was to be divided between the parſons. Lambs, calves, colts, and other tithable younglings, were to be tithed proportionably, having reſpect to the ſeveral places where they were begotten, born and fed, and the time they were in the ſeveral pariſhes. It was left to the cuſtom of different places to decide what ſhould be paid for tithe, where the milk for the ſmall number of cows was not ſufficient for making cheeſe; and what for lambs, calves, colts, fleeces, geeſe,

geeſe, or ſuch things as are too ſmall to pay a certain tithe. If ſheep were killed, or died by accident, after the feaſt of St. Martin, tithe was to be paid to the pariſh-church. If ſheep belonging to one pariſh were ſhorn in another, the tithe was to be given to the parſon of the pariſh where they were ſhorn; unleſs it could be ſhewn that ſatisfaction had been made for the tithe elſewhere [o].

To theſe two conſtitutions may be added a third of the ſame prelate, in which the articles ſubject to tithe are briefly ſummed up. It ordains, that tithe ſhould be paid of milk [p], of the profits of woods, pannage, of woods and of trees, if ſold; vivaries, piſcaries, rivers, ponds, trees, cattle [q], pigeons [r], ſeeds, fruits, beaſts in warrens; of fowling; of gardens; curtilages, wool, flax, wine and grain, turves in places where they were dug and made; ſwans, capons [s], geeſe, ducks, eggs, hedge-rows [t], bees, honey, and wax; of mills, hunting, handicrafts, and merchandiſe; as alſo of lambs, calves, colts, according to their value. In ſhort, ſays the conſtitution, let ſatisfaction be made of all other things to the churches whereunto they by law belong; no deduction being made, in calculating the tithe, for the expences attending the production of the thing, except only in handicrafts and merchandiſe [u].

Sylva cædua.

In the following reign, we find a conſtitution of archbiſhop Stratford upon the ſubject of *ſylva cædua*. Perſons, ſays that ordinance, had refuſed to pay tithe *de ſylvis cæduis, et lignis arborum cæduarum exciſis*, though theſe coſt leſs labour than the fruits of trees; alledging that they had

[o] Lynd. 197, 198, 199.

[p] The conſtitution adds, that this tithe ſhall be paid in Auguſt as well as the other month; it is therefore probable, that people claimed to be exempt from ſuch tithe during this month. This being the principal harveſt month, men might think it hard to pay tithe of milk, while they were paying tithe of corn, and were obliged to feed their harveſters with the milk. Johnſ. Canons, *ad locum*.

[q] *Pecorum*.

[r] *Columbarum*.

[s] *Caponum*; the Oxford copy has it *pavonum*.

[t] *Thenecii agrorum*.

[u] Lynd. 199, 200, 201.

never

CHAP. XXV.
HENRY VI.
EDW. IV.

never before paid it; and expreſſing a doubt, what was properly *ſylva cædua*. To remove this doubt it was now ordained, that *ſylva cædua* was that wood, of any kind, which was kept on purpoſe to be cut, and which being cut, grew again from the ſtump or root: of ſuch wood, it was declared that a real or prædial tithe ſhould be paid [x]. This is a more ſatisfactory explanation than the negative proviſion made by parliament on this head, in the ſame reign, which has been before mentioned [y]; and which merely declared, that wood of twenty years growth felled for ſhip-building, or the like uſes, ſhould not be conſtrued to be *ſylva cædua:* this ſtatute, however, is a ſort of evidence, that the definition contained in the above conſtitution was not ſufficiently attended to.

UPON theſe legiſlative regulations for the due payment of tithes, ſeveral obſervations ariſe, which have not eſcaped the accurate and diſcerning Lyndwood. Theſe contribute to open ſome difficulties, with which the ſubject would be otherwiſe embarraſſed. As to the uniformity which the firſt of theſe conſtitutions was to introduce through the whole province, it had, according to Lyndwood, no other meaning than that tithes ſhould be univerſally paid; for the different cuſtoms that prevailed in various parts of the kingdom, were ſtill to govern with reſpect to the mode in which they were to be collected. Various were the cuſtoms by which tithe uſed to be collected. Thus it was the cuſtom in ſome places to tithe corn in ſheaves, in others it was tithed while looſe; in ſome it was tithed in the field, in others in the owner's barn; in others it was carried to the parſon's barn [z]. The time of winter and ſummer, mentioned in the above conſtitutions, depended on the cuſtoms of different countries: in ſome places, ſheep were removed from one paſture to another about Michaelmas, and were there fed till Candlemas, or St. Peter, or

[x] Lynd. 190.
[y] Vid. ant. vol. II. 388.
[z] Lynd. 192. f.

the

the Annunciation; in others they were removed at the feaſt of All Souls, and continued till the feaſt of St. Philip and St. James; and the winter accordingly was ſaid to commence and finiſh at thoſe ſeveral periods [a].

It depended upon cuſtom what ſhould be paid for any particular tithe: but ſuch cuſtoms were always ſubject to this correction, that tithes being due, as the canoniſts held, *jure divino*, they could never be diminiſhed in value below the juſt tenth, by any cuſtom; though a cuſtom was eſteemed good which gave to the church more than the real tenth. If a cuſtom could not diminiſh the value of the tithe, much leſs would it be allowed to take away the whole tithe: a cuſtom, therefore, *de non decimando* was held to be bad [b].

Tithes were divided into *great* and *ſmall*, and into *prædial* and *perſonal*. Among ſmall tithes were reckoned wool, flax, milk, cheeſe, honey, wax, eggs, lambs, poultry, and other productions of animals, the fruits of trees, and all the productions of gardens [c]: the reſt were conſidered as great tithes. Prædial tithe was that which aroſe from mills, piſcaries, hay, wool, bees, and the fruits and produce of the earth: it was ſo called becauſe it came from a certain place [d]. Perſonal tithes were ſuch as were paid rather in reſpect of the perſon than the ſoil, as from the profit of a man's labour and employment. Some articles were of a mixed nature, ariſing partly from the ſoil, and partly from the labour and employment of men; as lambs, wool, milk, and ſome other things; and it was a matter of argument among the canoniſts, whether theſe were properly prædial or perſonal tithes. But the better opinion ſeems to have been, that they were prædial. Yet the ſhepherd who had the cuſtody of the ſheep, was bound to pay alſo a perſonal tithe of his wages. It was material to aſcertain, whether a tithe was of the former or

[a] Lynd. 194. [b] Ibid. 199. r. n. [c] Ibid. 192. [d] Ibid. 192.

latter

CHAP. XXV.
HENRY VI. EDW. IV.

latter deſcription; becauſe prædial tithes were due to the church of the pariſh where the land on which they aroſe was ſituated; perſonal tithes to the church where the perſon paying them heard ſervice and received the ſacraments [e].

Compoſition for tithes.

It is put as a queſtion by Lyndwood, whether the parſon could enter into a permanent compoſition with his pariſhioners to receive leſs than a tenth; and he anſwers it in the negative. For though, ſays he, a compoſition for tithes might well be made between clerks, yet it would not hold between a clerk and a layman. But in this there was a diſtinction: ſuch a compoſition, if for tithes already due, was good; but for tithes to be paid, a compoſition with a layman was held not to be good, unleſs ſanctioned by judicial authority of the biſhop [f]. The compoſition therefore ſpoken of in theſe conſtitutions, muſt mean ſuch a one as was to have no binding force on the ſucceſſor, and was only to adjuſt payments that ought to have been made before. Compoſitions of both ſorts ſeem to have been very common for ſmall tithes.

Prædial and perſonal tithes might, by poſſibility, be due in conſideration of the ſame thing. This was the caſe with reſpect to fiſh. If fiſh were taken in an incloſed place, a prædial tithe was due to the church of the pariſh where they were taken; but if they were taken in a ſtream that paſſed from one place to another, then a perſonal tithe would be due to that pariſh-church at which the perſon taking them heard divine ſervice and received the ſacraments. This, however, was only where a perſon fiſhed without paying any thing for ſuch liberty; for where he paid any rent or price, then a tithe of ſuch rent or price was due to the church of the pariſh where the fiſh were taken: the ſame of the tithe of birds and beaſts. The tithe of fiſh caught in the ſea was conſidered by

[e] Lynd. 200. b. [f] Ibid. 292. s. 194.

ſome

ſome as prædial; though the better opinion was, that this was a perſonal tithe [g].

THE tithe of mills, according to the above conſtitution, conſiſted in the tenth of their produce; and this, ſays Lyndwood, could only be effected by paying the tenth meaſure of all the corn ground there, for the benefit of the lord of the miller. For it was not ſufficient to pay the tenth of the rent, that being not the true value, as the tenant was to gain ſomething beyond the rent; but if the lord payed a tithe of the rent, and the tenant of his gains, every thing that was due to the church would be paid; and if the parſon preferred it, the tithe might be paid in that way. The produce of a mill was to be tithed as a prædial tithe, without deducting the expences; but if the mill was ſold, then the expences would be deducted; and after that the reſiduum, which was the clear gains, would be tithed as a perſonal tithe. The expences were conſidered in three lights: thoſe *in re*, thoſe *circa rem*, and thoſe *extra rem*. Thus ſuppoſe a mill was bought for 100*l*. this was of the firſt ſort of expence; 20*l*. was laid out upon repairs of it, this was of the ſecond; and 10*l*. in workmen, horſes, and the like, this was of the laſt ſort; in the whole 130*l*. If the mill was retained for ſix years and yielded 10*l*. *per ann*. produce, one of that ten would be paid each year in name of tithe, without any deduction of the expences; but if the mill was to be ſold at the end of the ſix years for 150*l*. a perſonal tithe muſt be paid of the profit, after allowing all the expences. But ſome doctors, among whom is Lyndwood, thought that the expences *extra rem* ſhould not in this caſe be deducted; and therefore the profit to be tithed, according to them, would be 30*l*[h]. It was held, that where tithe was paid for milk, and cheeſe was made of the other nine parts, no tithe ſhould be paid for ſuch cheeſe; but if the cheeſe was ſold, a perſonal tithe

[g] Lynd. 195. q.

[h] Ibid. 195. c.

ſhould

CHAP. XXV. HENRY VI. EDW. IV.

ſhould be paid for the gains made thereby [h]; ſo anxious were they that a tithe ſhould be paid upon every poſſible gain [i]. Perſonal tithes were due at the time when the gain on which they aroſe was received; but on account of the ſmallneſs of them, it is thought by Lyndwood, that they ſhould rather be paid at the end of the year. They were due only of the clear profit: if a thing therefore, inſtead of being ſold, was given away, or kept by the owner, it was not tithable, becauſe there was no profit; but according to the opinion of ſome doctors, if the money wherewith it was purchaſed had paid no tithe, the thing which came in in its place ſhould be tithed [k].

THE perſonal tithe that was demandable of the profit on merchandiſe, was a very ſerious conſideration in towns and cities. In the city of London, there was a cuſtom to pay by way of offering one farthing upon every ten ſhillings rent of a houſe, on Sundays and certain feaſts in the year. It had been endeavoured to repreſent this as a payment in lieu of ſuch perſonal tithe as aroſe from profit in merchandiſe; but Lyndwood combats this opinion with great earneſtneſs. He contends, that if this is at all to be conſidered as a tithe, it is a prædial one, being paid in proportion to the rent, which is prædial; if ſo, how, ſays he, is the payment of a prædial tithe to be a reaſon for exempting a perſon from paying a perſonal tithe? But the ordinance of the city expreſsly calls this an offering, and therefore it cannot be in lieu of any tithe whatever. For theſe, among many other weighty reaſons, he concludes, that the tradeſmen, artificers, and merchants of London are not,

[h] Lynd. 194. p.

[i] The ſweeping words in the conſtitution are *de omnibus bonis* JUSTE *acquiſitis*; upon which expreſſion it is gravely laid down by Lyndwood, in conformity with ſome foreign doctors, that perſonal tithe was not demandable out of the gains of common proſtitutes, as long as they continued in a ſtate of impenitence; but when they became penitents, it might be accepted: and even before, provided the conſent of the dioceſan was obtained. Lynd. 195. o.

[k] Lynd. 195. y.

by

by reaſon of this offering, exempt from paying a perſonal tithe of their profit in merchandiſe and employments [l].

To ſecure the regular payment of theſe dues, all rectors, vicars, and chapellains, are enjoined by the above conſtitutions to admoniſh their pariſhioners of their duty in this reſpect to the church. If they diſregarded ſuch admonitions, they were to be ſuſpended *ab ingreſſu eccleſiæ*; and if they ſtill continued obſtinate, were to be proceeded againſt with eccleſiaſtical cenſures. And farther, if the rector, through fear or indolence, was negligent in demanding his tithes, this neglect of the church's rights was to be puniſhed with ſuſpenſion till he paid a fine to the archdeacon [m].

To this account of the law of tithes given by our canoniſt, it does not ſeem at all neceſſary to add any thing from our books of common law. It was ſo expreſsly laid down by the ſtatutes of *circumſpectè agatis*, and *articuli cleri* [n], in what caſes they were objects of ſpiritual or temporal juriſdiction, that there had rarely ariſen any controverſy upon that head. If they were not converted into lay chattels, or bound by any lay contract, or in particular caſes, as if they did not exceed a fourth part of the benefice, they were clearly within the cogniſance of the ſpiritual court. It muſt however be remarked, that there is a caſe in the time of Edward III. in the exchequer, where a king's debtor prayed proceſs againſt a perſon who had part of his goods, and ſo rendered him leſs able to ſatisfy the king's demand; upon which the party appeared, and claimed the goods as tithe; the other did the ſame as parſon; after this the perſon brought in by proceſs pleaded to the juriſdiction. This plea, we are told, was not allowed, but the queſtion was held to belong to the exchequer, becauſe it was the king's ſuit. The reporter expreſſes his ſurpriſe, and adds, that neither the king's

[l] Lynd. 201. d. [m] Ibid. 196, 197. [n] Vid. ant. vol. II. 216. 291.

bench

CHAP. XXV. HENRY VI. WED. IV.

bench nor common-pleas would in like manner entertain ſuits for tithes [o]. This caſe happened about twenty years after the proceeding for tithes by *ſcire facias* in the temporal courts had been taken away by ſtatute [p].

HAVING gone through the three points of moſt intricacy in the common courſe of clerical judicature, cauſes of matrimony, of teſtaments, and of tithes, we ſhall paſs on to thoſe which involve leſs diſcuſſion, and therefore, tho' of great importance in themſelves, require leſs attention in the ſtudent.

Spoliation.

THE title of benefices eccleſiaſtical, without touching the trial of the patronage, belonged to this court, and might be brought in queſtion in two ways, either upon the avoidance or ſpoliation of a benefice: the former are declared to belong to the ſpiritual judge, by ſtat. 25 Edward III. *pro clero*, ch. 8. They might depend either upon death, reſignation, deprivation, creation, or ceſſion. Whether a church was full or not, or the clerk properly qualified, was triable by this court [q]. The ſpoliation of a benefice was triable in this court, only where a clerk was in as an incumbent; for if he was in as an uſurper of the church, which was full, or as a treſpaſſer, the remedy was by action of treſpaſs, and not by ſuit for the ſpoliation [r]. If two incumbents were in, and they claimed by different patrons, no ſpoliation would lie, becauſe the right of advowſon came in queſtion; but where they both claimed by one, a ſuit for ſpoliation lay [s].

PENSIONS granted out of churches, mortuaries, and oblations, belonged to this court, both by ſtat. *circumſpectè agatis* [t], and by the common law [u]. A penſion might alſo be ſued for at common law, by writ of annuity; but

[o] 38 Aſſ. 20.

[p] Vid. ant. vol. II. 378. How matters of equity became cogniſable in the exchequer, by reaſon of the ſuit of the king, vid. ant. vol. III. 228.

[q] 22 Ed. IV. 24.

[r] 44 Ed. III. 33

[s] 38 Hen. VI. 19, 20. An Apologie, &c. 31.

[t] Vid. ant. vol. II. 216.

[u] Reg. 47.

if

if the claimant went upon a preſcription, and afterwards ſued for it as a penſion in this court, a prohibition would lie [x]. It was held, in the time of Edward III. in an aſſiſe, to be a good plea to the juriſdiction of the temporal court, to ſay that the land was a church-yard [y]: this was conformable with the law before laid down by Bracton [z]; and it was once held, that if a perſon took trees in a church-yard, the remedy was not by treſpaſs, but by ſuit in this court [a]. That a pariſh or hamlet claiming a right to have a curate to perform divine ſervice, might proceed to eſtabliſh ſuch right in this court, was conſidered as of long uſage; notwithſtanding, an action upon the caſe was held maintainable for ſuch neglect [b]. We find a ſuit for with-holding a chauntry was deemed good, upon conſultation; which being within the ſame reaſon, gives ſanction, as it ſhould ſeem, to the other caſe. That pariſhioners might be cited in a cauſe of *contribution* towards the reparation of the body of a church, is proved from the ſtatute *circumſpectè agatis* [c]; from the Regiſter [d]; and from authorities in the time of Henry VIII [e].

It ſeems unneceſſary to adduce any authorities from our ſtatutes or books of common law, to ſhew what countenance had been given to the judicature of this court, in the puniſhing of offences that ſavoured of impiety. If a court chriſtian has any juriſdiction at all, it is ſurely in matters of this nature; and the legiſlature, inſtead of making any ſpecial recognition of ſuch authority, has been content to paſs it over under the general deſcription of *merè ſpiritualia*, or of crimes for which the puniſhment of penance uſed to be inflicted [f]. It is true, that of late years the legiſlature had been induced to point out certain new ſectaries as objects of particular animadverſion;

[x] Vide Goodall, &c.
[y] 44 Aſſ. 8.
[z] Vid. ant. vol. I. 454.
[a] Fitz. proh. 26.
[b] 22 Hen. VI. 52.
[c] Vid. ant. vol. II. 216.
[d] Reg. 45. 48.
[e] F. N. B. Conſult.
[f] Vid. ant. vol. II. 216.

CHAP. XXV. HENRY VI. EDW. IV.

but they at the ſame time fully recogniſed the former authority of the biſhops [g].

PERJURY in an eccleſtaſtical cauſe, or matter, was an offence properly cogniſable in this court. Under the title of perjury we come to conſider the breach of a voluntary oath, whether taken privately, or publicly before an eccleſiaſtical judge, as was common in theſe days. This has been frequently before mentioned, under the term of *læſio fidei*, as a diſputed object of clerical judicature. The ſame doubt ſeems ſtill to have continued; for upon compariſon of ſome caſes, in this and the foregoing reigns, there is a contrariety that ſtands in need of ſome diſtinction to reconcile it. In the caſe of the vicar of Saltaſh, who had made an obligation, and had bound himſelf to the obſervance of it, by oath taken before the pope's collector, it was declared by *Hankford* juſtice, that no one ſhould be ſued before the ordinary for perjury, but where the principal matter on which the perjury aroſe was of a ſpiritual nature; for if it was otherwiſe, he might in that manner be compelled to perform lay contracts, which belonged only to the temporal courts [h]. A few years after, it was likewiſe held, that where a man had ſworn to make a feoffment, he ſhould not, for the above reaſon, be ſued for breach of his oath in the clerical court [i]. Theſe caſes happened in the reign of Henry IV. and the ſpirit of them was maintained in ſome opinions delivered in the two preſent reigns. In 38 Hen. VI. the ſame law was laid down by *Forteſcue*, in the exchequer-chamber, and was admitted by ſome others of the judges, and denied by none [k]. Again, in 20 Ed. IV. it was declared by *Brian*, that where faith was made concerning a ſpiritual matter, as to pay tithes or to marry, the breach thereof ſhould be puniſhed in the ſpiritual court; but not if it was upon a

Suits *de læſione fidei*.

[g] Stat. 2 Hen. IV. c. 15, and 2 Hen. V. c. 7. Vid. ant. vol. III. 235. 260.

[h] 2 Hen. IV. 15. Bro. Præm. 16.

[i] 11 Hen. IV. 88.

[k] 38 Hen. VI. 29.

temporal

temporal matter [l]. Again, in 22 Ed. IV. where an oath had been made for the payment of money, the ſame opinion was delivered; but the reaſon then given by *Brian* is, becauſe an action would lie for the money at common law [m]. Theſe opinions ſeem only to confirm what had long ſince been delivered by Bracton [n].

But notwithſtanding theſe declarations of the judges, it is beyond queſtion, that the courts eccleſiaſtical did *de facto* hold plea of breach of oath and of faith falſified, or *de fidei læſione*, as it was termed (which was conſidered by the canoniſts, in ſome reſpects, as the breach of a corporal oath) even when ſuch oath or faith, voluntarily taken, was for confirming of a matter temporal: and this appears not only from the teſtimony of canoniſts, but from deciſions in our courts of common law. It muſt be recollected, how poſitively this object of juriſdiction is aſſerted by the conſtitution of Boniface, in the reign of Henry III. in which it is claimed abſolutely, without any diſtinction whether the cauſe was ſpiritual or temporal [o], provided there was no mention of chattels. Such matters are alſo admitted to belong to the clerical judicature, by the ſtatute *circumſpecte agatis*, provided money was not demanded [p]. Conformably with this laſt idea, it was held, in the time of Edward III. that tho' the ordinary, in ſuch caſes, could not enjoin the party to pay the debt according to his oath, yet he might enjoin him corporal penance [q]; which opinion was confirmed by one in the 34 Henry VI. when it was held, that where a man bought a horſe, and ſwore upon the Evangeliſts to pay 10*l.* for it by ſuch a day, if he broke his faith, an action of debt might be had at common law, and alſo a ſuit *pro læſione fidei* in the ſpiritual court: and it was ſaid, this would be no prejudice

[l] 20 Ed. IV. 10.
[m] 22 Ed. IV. 20.
[n] Vid. ant. vol. I. 455.
[o] Vid. ant. vol. II. 79.
[p] Vid. ant. vol. II. 217.
[q] 22 Aſſ. 70. Fitz. Prohib. 2.

CHAP. XXV.
HENRY VI.
EDW. IV.

to the ſpiritual court, becauſe the two proceedings were for different objects [r]. A new turn, however, was given to this doctrine by our courts of common law, in the latter end of Edward IV.; for it was then declared by *Brian* and *Littleton*, without any one contradicting them, that *in læſione fidei* ariſing upon a temporal matter, the ſpiritual court might puniſh *ex officio*, but not at the ſuit of the party. This latter opinion was adopted in the next reign [s], and is the lateſt opinion in our books of common law upon this famous queſtion. It is thought the temporal judges required the proceeding to be *ex officio* rather than at the ſuit of a party, becauſe it was preſumed that the party would not proſecute merely for the puniſhment of the ſin, but for pecuniary ſatisfaction for the injury [t].

LYNDWOOD, however, ſeems to entertain no ſuch diſtinction, but ſpeaks as if the proceeding might be either way; and he gives the form of a libel, which he thinks ſo drawn as not to be liable to a prohibition: this we ſhall give the reader at length, not only to illuſtrate the preſent point, but as a ſpecimen, and the only one, of pleadings in this court. The form of the libel is as follows: *A proponit in judicio contra B. quòd idem B.* FIDEI SUÆ INTERPOSITIONE (or *juramento ſuo medio*) *promiſit et ſe aſtrinxit dicto A. decem libras tali die fideliter ſoluturum; quia tamen fidem,* (or *juramentum*) *idem B. dicto die adveniente promiſſum ſuum hujuſmodi non ſervando, ſed contrà illud temerè veniendo damnabiliter violavit, minùs canonicè prætendens ſe dictæ fidei ſuæ,* (or *juramenti*) *interpoſitione hujusmodi vinculo non ligari, cùm re verâ fidei interpoſitio* (or *juramentum*) *hujuſmodi ipſum ad præmiſſa fideliter ſervanda, ſecundum jus divinum, et inſtituta canonica, ſub pœnâ peccati mortalis effectualiter aſtrinxerit, et aſtringat. Quarè factâ fide, quæ requiritur in hac parte, petit pars dicti A. per vos dominum judicem antedictum pronunciari, decerni, et decla-*

[r] 34 Hen. VI. 70.
[s] 12 Hen. VII. 22.
[t] See an Apologie, &c. Part I. 48 to 52.

rari

rari ſupradictum B. præfatæ ſuæ fidei interpoſitione (or *juramenti vinculo*) *ad ſervandum et implendum promiſſa de jure divino, et juxta canonica inſtituta effectualiter, et ſub pœnâ peccati mortalis aſtrictum et ligatum fuiſſe, et eſſe, nec non eundem B. fidem ſuam* (or *juramentum*) *hujuſmodi temerè violâſſe, ac pro violatione ipſâ canonicè puniendum fore, et puniri debere* [u].

THUS far of offences of the firſt claſs: next as to thoſe of the ſecond, concerning which there is abundance of common-law teſtimonies. As to uſury, we find it declared by ſtat. 15 Ed. III. c. 5. that the king ſhould have conuſance of uſurers dead, and the ordinaries of ſuch as were alive. This divided empire was noticed before from Glanville [x].

NOTWITHSTANDING defamation is mentioned in the ſtatutes of *circumſpectè agatis* and *articuli cleri* as an object of ſpiritual cogniſance, without adding any qualification as to the nature of the defamation [y], yet an exception had been lately introduced, ſimilar to that which governed in many other points of diſputed juriſdiction. It ſeems, from the tenor of *Hankford*'s argument in the caſe of the vicar of Saltaſh, before quoted, that if the defamation aroſe on a temporal cauſe, it was held not to be cogniſable in the eccleſiaſtical court [z]. So in the reign of Edward IV. it was ſaid, that where a perſon charged another with a robbery, the party diffamed could not ſue in the ſpiritual court, becauſe he might have an action at common law; and where an action of treſpaſs was brought for goods taken, and the defendant ſued in the ſpiritual court for defamation, a prohibition was granted [a]. There is alſo in the Regiſter a prohibition to a ſuit for defamation, where a perſon had been a witneſs on an inquiſition taken for the king, and the party affected revenged himſelf in

Defamation.

[u] Lynd. 315. o.
[x] Vid. ant. vol. I. 119.
[y] Vid. ant. vol. II. 217. 291.
[z] 2 Hen. IV. 15.
[a] 18 Ed. IV. 6.

this

CHAP. XXV. HENRY VI. EDW. IV.

this manner for the loſs he thereby was likely to ſuſtain [b]. We have ſeen, that a ſtatute was made in the reign of Edward III. declaring, that a prohibition ſhould go to all ſuits for defamation againſt indictors [c].

THE laying of violent hands on a clerk, was an offence that was expreſsly aſſigned to the cogniſance of the ſpiritual court, by the ſtatutes of *circumſpectè agatis* and of *articuli cleri* [d], and it now reſted intirely upon the diſtinction there laid down; for it was held, in 22 Ed. IV. that if a man beat a clerk, and he ſued him in this court for his ſin of excommunication, he did well; but if he ſued there for amends, a prohibition would lie [e]. That ſacrilege was both a ſpiritual and temporal crime, appears by ſome caſes at common law of a very early date; where it is laid down, that in caſe of goods ſtolen out of a church or church-yard, the owner might ſue for them in this court; the ſame of trees growing in a church-yard [f]. According to Lyndwood, this was now deemed both a ſpiritual and temporal crime [g]. Dilapidations were an object of ſpiritual cenſure; for in the time of Henry IV. it was held by *Tirwhit*, that if an eccleſiaſtical perſon made waſte of a benefice, he ſhould be depoſed as a dilapidator of his church; and depoſition was an act of the ſpiritual judge [h]. We have the authority of Lyndwood for ſaying that inceſt, whoredom, and any incontinence, ſimony, uſury, hereſy, perjury, witchcraft, fortune-telling, drunkenneſs, and the like diſorders and immoralities were crimes puniſhable in the ſpiritual court [i].

Eccleſiaſtical courts.

SUCH was the mode of proceeding, and ſuch were the objects of juriſdiction in our eccleſiaſtical courts. It is next to be ſeen what courts theſe were, and who preſided in them. This, after what has already been ſaid, need not

[b] Reg. 42.
[c] Vid. ant. vol. II. 459. Vid. An Apologie, &c. 56.
[d] Vid. ant. vol. II. 215 292.
[e] 22 Ed. IV.
[f] 4 Hen. III. and 17 Hen. III. Fitz. Prohib. 14. 26.
[g] Lynd. 315. q.
[h] 2 Hen. IV. 9.
[i] Lynd. 96, o.

detain

detain us long. An Engliſh biſhop, conſiſtent with the ſcheme we have juſt given from the canon law [k], had ſpiritual juriſdiction thro' his whole dioceſe. The perſon who executed all of this charge which did not belong to the biſhop by reaſon of his order, was called a chancellor; tho' it is remarkable that he is not ſo named in any of the commiſſions he holds, nor executes the proper duty of a chancellor. In early times, it is ſaid that biſhops had ſuch an officer, who kept their ſeals. The chancellor of a biſhop in this country uſually holds two offices, that of *vicar-general*, and that of *official principal*; both which have been mentioned as appointments known to the canon law [l]. The firſt was to exerciſe juriſdiction purely ſpiritual; as viſitation, correction of manners, granting inſtitution, and a general inſpection and ſuperintendance of things for the preſervation of diſcipline and good government in the church. The buſineſs of the latter (in which we are more particularly intereſted) was to hear cauſes. Though theſe two offices have been uſually granted together, yet there are inſtances of vicars-general being appointed ſeparately upon occaſional abſence of the biſhop; which, indeed, was the original deſign of ſuch an eſtabliſhment.

THE authority of a chancellor, like that of his biſhop, is generally given ſo fully as to extend over the whole dioceſe to all matters and cauſes eccleſiaſtical. But a biſhop might create ſome exceptions to this general juriſdiction, by giving a limited one to a *commiſſary*. A commiſſary's authority was reſtricted to certain places, and to certain cauſes. Theſe officers correſpond with what the canoniſts called *officiales foranei* [m], as if reſtrained *cuidam foro* only of the dioceſe. Another exception to the juriſdiction of the chancellor was that of an archdeacon. In ſome archdeaconries, partly by grants from the biſhop, and partly by cuſtom, the archdeacon exerciſes both ſpiritual and ju-

[k] Vid. ant. 4. [l] Vid. ant. 5, 6. [m] Vid. ant. 6.

dicial

CHAP. XXV. HENRY VI. EDW. IV.

dicial authority; and this, as to cauſes and things, is of more or leſs extent in different places; and in ſome is peculiar and exempt from the biſhop, in others only concurrent. But this limited juriſdiction of the archdeacon differs from that of the commiſſary, and alſo of the chancellor, inaſmuch as he does not receive it by delegation, but has it *jure ordinario*, as ordinary; and where he does not preſide himſelf, he appoints an official, who, from his reſtriction to certain places and cauſes, may be reſembled to the commiſſary of the biſhop. The title given to all ſpiritual courts was that of conſiſtory.

THUS there was in every dioceſe a court held before the official principal of the biſhop; and in ſome there was alſo one held by the biſhop's commiſſary, and by the official of ſome archdeacon. Beſides theſe, there were courts of the archbiſhops who had two juriſdictions; one dioceſan, like the other biſhops; the other was a ſuperintendance over the biſhops of their reſpective provinces. The archbiſhop of Canterbury was conſidered as *legatus natus* in England[n]. He had five courts; the court of arches, two courts of peculiars, the court of audience, and the prerogative court. The former was uſually held in Bow church, called *eccleſia ſanctæ Mariæ de arcubus*; and ſo from the church this court was called *curia de arcubus*; and it was held by the official principal of the archbiſhop, called *officialis de arcubus*. The court of peculiars was held by the dean of the peculiars, having juriſdiction over the thirteen pariſhes called the peculiars of the archbiſhop in London: the dean uſed alſo to hold his court in Bow church. The other court of peculiars was held by the ſame perſon by the title of *judge of the peculiars*, and he had juriſdiction over fifty-ſeven pariſhes lying in different dioceſes, and not ſubject to the biſhop or archdeacon, but to the archbiſhop. The *court of audience* uſed to be held in the archbiſhop's palace

[n] Vid. ant. 6.

before

before auditors, who heard ſuch matters, whether of contentions, or voluntary juriſdiction, as the archbiſhop thought fit to reſerve for his own determination: they prepared evidence and other materials to lay before the archbiſhop for his deciſion. This was afterwards removed from the archbiſhop's palace, and the juriſdiction of it exerciſed by the *maſter*, or *official of the audience*, who held his court in the conſiſtory place at St. Paul's. The great offices of official principal of the archbiſhop, dean, or judge of the peculiars, and official of the audience, have ſince been united in one perſon, under the general name of dean of the arches, who is alſo vicar-general of the archbiſhop [o]. Theſe courts are at preſent all held in Doctors Commons, as is alſo the prerogative court by the judge of the prerogative court. This court was for the cogniſance of all wills, where, the teſtator having *bona notabilia*, the proof and adminiſtration, according to Lyndwood, belonged to the archbiſhop by a ſpecial prerogative [p]. The *curia de arcubus* was known under that name long before the reign of Henry II.

All ſuits were to be commenced in the court of the official principal of the dioceſe, unleſs the place where the cauſe of ſuit aroſe was within a peculiar and exempt juriſdiction, whether of an archdeacon, or the archbiſhop; and then before the official of the former, or the dean or judge of the peculiars of the latter, as the caſe might be. There lay an appeal from the archdeacon or his official to the biſhop, that is, to his official principal; and from the official principal of the biſhop to the archbiſhop, that is to his official principal; for the conſiſtory of the official principal being in effect only the court of the biſhop, the appeal, if to him, would be *ab eodem ad eundem*. From the archbiſhop the regular courſe of appeal was to the pope. No appeal could be carried *per ſaltum* from the archdeacon

[o] Johnſ. 254, 257. Gibſ. 1004.

[p] Vid. ant. 77.

to

CHAP. XXV. HENRY VI. EDW. IV.

to the archbiſhop; tho' a rule of the canon law, as we have ſeen, allowed ſuch premature appeal to the pope in any ſtage of the proceeding[r].

SUCH were the eccleſiaſtical courts, and ſuch their dependence on, and relation to, each other. Such they ſtill continue, with very little alteration, except in the point of papal reviſion and controul, which was taken away in the reign of Henry VIII.

Prohibitions.

THE common-law juriſdiction, by which the ſpiritual court was controuled and circumſcribed, ſeemed of late to be enlarging its powers of attack; for prohibitions, which hitherto had been confined to the chancery and king's bench, were now held by all the judges of the common pleas, upon view of former precedents, to belong alſo to that court. But they made the following diſtinction between this court and the others; that in this there muſt always be an original writ depending for the ſame matter, otherwiſe they had no authority to prohibit: inſtead, therefore, of granting a prohibition, as the king's bench, in the firſt inſtance, the courſe was to get an original writ of prohibition out of chancery, returnable in the common pleas, commanding the juſtices to make attachment. It was on the ſame occaſion agreed, that the common pleas had authority, in the like manner, to grant writs of conſultation[s].

Provincial conſtitutions.

THE reader has been detained ſo long with the detail of the juridical ſyſtem which prevailed in our eccleſiaſtical courts at this time, that he will probably be content with a ſlight notice of what was done by the clerical legiſlature. Our attention has not been drawn to the tranſactions of the provincial ſynods, ſince we mentioned the conſtitutions of archbiſhops Peckham and Winchelſey, in the reign of Edward I. From that period down to the preſent, the archbiſhops of Canterbury had held many

[r] Gibſ. 1036.

[s] 38 Hen. VI. 14.

provincial

provincial ſynods, and made various conſtitutions therein. In 1322 a ſynod was held, and conſtitutions made by Walter Reynolds; in 1328, 1330, 1332, by Simon Mepham; in 1342, and 1343, by John Stratford; in 1351, 1359, and 1362, by Simon Iſlep; in 1367, by Simon Langham; in 1378, by Simon Sudbury; in 1391, by William Courtney; in 1398, by Roger Walden; in 1408, by Thomas Arundel; in 1415, 1416, 1430, 1434, and 1439, by Henry Chichley; in 1445, by John Stafford. While the province of Canterbury was thus regulated by the care and induſtry of ſucceſſive prelates, there appear no proviſions made for the like purpoſe by the archbiſhops of the other province, except the conſtitutions of William de la Zouche in 1350; thoſe of John Thorſby in 1363, which were partly a republication of thoſe of the former prelate; and thoſe of John Kemp in 1444, which were partly tranſcribed from ſome of Winchelſey's in 1305. This ſeemed a defect in the clerical polity; to remedy which, and to reduce the order, diſcipline, and judicature of the national church to ſome uniformity, it was provided in 1462, in a convocation of the clergy of York, held by William Booth, that the effect of the conſtitutions of the province of Canterbury, had, and obſerved, and being no wiſe repugnant or prejudicial to thoſe of York, ſhould be admitted into that province, but not otherwiſe, nor in any other manner; and for that purpoſe ſhould be inſerted and incorporated with them [t]. Thus was a body of national canons collected for the obſervance of the whole kingdom. As matters of diſcipline were firmly ſettled according to the Romiſh ſcheme, and the principal oppoſition to it, which had been raiſed by Wickliff's followers, was now ſilenced, the convocations had little of moment to engage their attention; and we accordingly find nothing of importance added to the above body

[t] Johnſon's Canons, vol. II. 1463.

of

CHAP. XXV.

HENRY VI. EDW. IV.

of conſtitutions. The whole of theſe, from the time of Lanfranc as far down as 1430, were digeſted and commented on by Lyndwood, and in that form preſented a valuable depoſitory of Engliſh eccleſiaſtical law.

The king and govern ment.

THERE is no mention that the firſt of the kings whoſe reigns we have now been reviewing, took any perſonal concern in providing for the improvement of our law, or ſhewed any remarkable regard for it. The following facts related of Edward IV. place him in a different light. It is ſaid by the writer of the Hiſtory of Crowland Abbey, that this king went in perſon with the judges to try criminals in different parts of the kingdom; *nemini, etiamſi domeſtico ſuo, parcens, quò minùs laqueo penderet, ſi in furto vel latrocinio deprehenſus fuerit* [u]. We are told alſo, that in the ſecond year of his reign he ſat three days together, in Michaelmas term, in the court of king's bench; to which attendance he was excited by a ſtrong deſire, it is ſaid, to underſtand the law [x].

UPON the whole, the law was left to itſelf to maintain its ground as it could, amidſt the convulſions which the nation underwent during great part of this period. During the reign of Richard II. the dignity of the law, together with the honour of the kingdom, through the weakneſs of that prince, and the difficulties occurring in his government, ſeemed ſomewhat to decline [y]. When the law had taken this unfavourable turn, it required every encouragement from the ſettled ſtate of things in the reigns of Henry IV. and V. to recover itſelf. This it effectually did; and having gathered ſtrength, it began to flouriſh in a manner which enabled it to withſtand all ſhocks from the political world. In the latter part of the reign of Henry VI. while the nation was in arms, and the throne was overturned by ſucceſſive revolutions, the courts of law enjoyed an entire

[u] Gale, vol. I. 559. Bar. Stat. 419.

[x] Truſſ. Cont. of Dan. 184. Bar. Stat. 429.

[y] Hale's Hiſt. 174.

peace;

peace; and juſtice was adminiſtered with a preciſion, learning, and effect, that was not ſurpaſſed in any times before or ſince. Both theſe reigns abounded with eminent lawyers.

EDWARD IV. with all his regard to the laws, was guilty of ſtraining the conſtruction of them to gratify his reſentments. It is a common ſtory of this king, that having killed a favourite deer of a Mr. Burdet, of Arrow in Warwickſhire, that gentleman vented his reſentment by wiſhing the horns of the deer in the belly of the man who had adviſed the king to that inſult upon him; for which the king ordered him to be proſecuted as for treaſon, and that unhappy gentleman was beheaded. This man is ſaid by others to have been proſecuted (no doubt under a fictitious charge) for poiſoning, ſorcery, and inchantment [z], and that he was attainted by parliament. Theſe ſupernatural gifts were conſidered as common, and the ſuppoſed exerciſe of them was puniſhed as a very heinous offence in thoſe times: one John Stacy was executed for a charge of that kind in this reign.

RICHARD II. raiſed money upon the ſubject without conſent of parliament; a ſtretch of prerogative which neither Hen. IV. V. nor VI. ever attempted. It is remarked of the houſe of Lancaſter, that its princes always paid a regard to the rights of the people; a policy to which they adhered probably to avoid exciting any ſpirit to queſtion their title to the throne. This temper in the crown contributed to raiſe the houſe of commons into great conſideration during theſe reigns: they became more jealous of their rank in the ſtate than ever, and particularly on this ſubject of taxation. It is to be attributed to this, that when Edward IV. invented a new method of raiſing money without aſſent of parliament, it was thought prudent to give it the gentle name of a *benevolence*.

THERE happened in 31 Hen. VI. a fact which greatly infringed the privileges of this riſing part of the legiſla-

[z] Stowe's Chron. 430.

ture.

CHAP. XXV. HENRY VI. EDW. IV.

ture. Their ſpeaker, *Thomas Thorpe*, was taken in execution in an action of treſpaſs *de bonis aſportatis*, at the ſuit of the duke of York, then preſident of the parliament. The commons made a repreſentation of this to the king and lords, and they conſulted the judges; who were of opinion, that if a member of parliament was arreſted for any cauſe but treaſon, felony, or ſurety of the peace, or for a judgment had before parliament, it was uſual for ſuch perſon to be diſcharged from the arreſt. But, notwithſtanding this direct and expreſs opinion, the lords came to a reſolution, that the ſpeaker ſhould continue in cuſtody, notwithſtanding his privilege of member and ſpeaker[a]. The commons acquieſced in this reſolution, and choſe another ſpeaker in his place. This temper in the commons can only be accounted for from the prevailing prejudice in favour of that great pretender to the throne.

THERE ſeems to be the ſame irregularity in criminal proceedings as in the former periods. Even in a time of tranquillity, and under the adminiſtration of the good duke of Glouceſter, in the reign of Henry VI. a ſtate-criminal was ſentenced without any trial. Sir John Mortimer had been committed to priſon, and having eſcaped was indicted for that eſcape: the indictment was removed into the houſe of lords, where he was adjudged guilty, and was executed. However, here had been an examination by the jury at leaſt who found the bill; and we have ſeen that, in the early ages of our law, that was the utmoſt which a priſoner was entitled to[b].

In the 27 Henry VI. we find a very ſingular proceeding againſt the duke of Suffolk. This nobleman was impeached by the commons. The duke upon his knees denied the whole charge before the lords. At length the king ſent for all the lords ſpiritual and temporal then in town to his chamber. There the chancellor put the queſtion to the

[a] Cotton, 651. Parl. Hiſt. vol. II. 287. [b] Vid. ant. vol. II. 31, 32.

duke,

duke, which way he would be tried: to this the duke answered by referring to his former denial of the charge; and, proteſting his innocence, put himſelf intirely on the king's mercy an award. Then the chancellor, by the king's command, pronounced this ſentence: "That ſince "the duke did not put himſelf on his peerage, the king as "to the articles of treaſon was doubtful; and as to the "articles of miſpriſion, the king, *not as judge by the ad-* "*vice of the lords*, but as one to whoſe order the duke had "ſubmitted himſelf, did baniſh him the realm and other his "dominions for five years." After this, the lord high-conſtable ſtood up on behalf of the biſhops and lords, and required it to be enrolled, that the ſaid judgment was by the king's own rule, and not by their aſſent; and alſo required, that neither they nor their heirs ſhould by this example be barred of their peerage and privileges [c].

The ſtatutes.

THE memorials of the law during this period conſiſt in the ſtatutes, rolls of parliament, the year-books, and ſome law-treatiſes. Many inconveniencies ſtill aroſe from the antient method of making the ſtatutes from the petition and anſwer on the parliament-roll. To remedy theſe, about the end of the reign of Henry VI. or beginning of Edward IV. the practice was introduced of putting the proviſions intended to be made, into the full and complete form of an act of parliament, in the firſt inſtance; which was the identical inſtrument that received the king's aſſent. To this they uſed to prefix this title: *Item quædam petitio exhibita fuit in hoc parliamento* FORMAM ACTUS *in ſe continens*; a title which imported in the terms of it a remembrance of the antient method of preferring a petition. This title is now diſuſed; but, excepting that circumſtance, this is the preſent way of paſſing acts of parliament. The language of the ſtatutes during the reigns of Henry VI. and Edward IV. was ſometimes Engliſh, but more uſually French.

[c] Parl. Hiſt. vol. II. 273.

Of

CHAP. XXV.
HENRY VI.
EDW. IV.

Reports.

Of the year-books of Henry VI. and his ſucceſſors it may be ſaid, that both the matters and ſtile of them are more ſuited to the reading of a modern lawyer than any of the former; ſo that they are much more worthy of notice than thoſe of the preceding reigns. They contain a fuller account of what paſſed in court; queſtions of law are more thoroughly debated, and the opinions of the judges given more at length. The ſecond part of Henry VI. and the whole of Edward IV. particularly the long *Quint*, as it is called, are full of excellent learning. The firſt part of Henry VI. is pronounced by a great lawyer to be more barren, ſpending itſelf in much learning of little moment, and long ſince out of uſe [d].

The other productions of the lawyers of this period which have come down to us, are ſome law-treatiſes. One of theſe is Forteſcue's book *De Laudibus Legum Angliæ*; the other is Littleton's *Tenures*; to which may be added *Statham's* Abridgment.

Forteſcue.

Sir John Forteſcue, who had been ſome time chief-juſtice of the king's bench, is ſaid to have written this work, *De Laudibus Legum Angliæ*, while he was enduring an exile with the prince of Wales, and others of the Lancaſtrian party, in France. Sir John was then made chancellor; and in that character he ſuppoſes himſelf holding a converſation with the young prince on the nature and excellence of the laws of England compared with the civil law, and the laws of other countries. He conſiders at length the mode of trying matters of fact by jury, and ſhews how it excels that by witneſſes. He informs us, that ſome of our princes wiſhed to introduce the civil law merely for the ſake of governing [e] in the arbitrary way allowed by that law, which declares, *quod principi placuit, legis habet vigorem*. He then proceeds to examine ſome other points of difference between the civil and common law,

[d] Hale's Hiſt. 176. [e] Chap. 34, 35, 36.

always

always deciding in favour of our own, particularly in the following inſtances: the baſtardizing the iſſue born before wedlock[f], *partus non ſequitur ventrem*, SED SEQUITUR PATREM; guardianſhip committed to thoſe who could not by law ſucceed to the inheritance[g]; and in the puniſhment of theft no regard paid to a diſtinction between *furtum manifeſtum & non manifeſtum*[h]. He concludes his book with a ſhort account of the ſocieties where the law of England was ſtudied, the degrees and ranks in the profeſſion[i], with the manner in which they were conferred: to theſe are ſubjoined ſome ſhort remarks on the conduct and delay of ſuits.

THIS treatiſe ſeems to be intended as an introduction to ſome more particular work on the Engliſh law; the object of it being rather to take off the diſcredit which ſome civilians had endeavoured to throw on it, and to promote a more general acquaintance with it among perſons who did not ſtudy it profeſſionally. It is written in a tolerable Latin, and diſplays ſentiments upon liberty and limited government, which one would hardly expect to find in a writer of this period. There runs through the whole an air of probity and piety, that conciliates the attention of the reader, in ſpite of the many ſcraps quoted from the Fathers, which are interſperſed profuſely, and often very much out of ſeaſon. This is the principal work of our author, to whom we are indebted for ſome others of leſs note.

LITTLETON was a judge of the common-pleas in the reign of Edward IV. and compoſed his book of *Tenures* for the uſe of his ſon, to whom it is addreſſed. It contains three books; the firſt, upon eſtates; the ſecond, upon tenures and ſervices; which two were deſigned to explain more at large the principal ſubject of the old book of tenures: the third diſcourſes of ſeveral incidents and conſe- Littleton,

[f] Chap. 40. [g] Chap. 44. [h] Chap. 48. [i] Chap. 42, 43, 44.

CHAP. XXV.
HENRY VI.
EDW. IV.

quences of tenures and eſtates. This little treatiſe has acquired more notice than any other book in the law; which is to be aſcribed partly to the nature of the ſubject, partly to the manner in which it is treated, and partly to the great character of the writer when a judge.

THE learning of real property had in the reign of Edward III. been cultivated with a minute attention: the period which had elapſed from that reign to the time when our author wrote, had produced many additions and modifications of it, till this branch had grown into a very refined ſyſtem, conſtituting, in every reſpect, the moſt intricate part of our juriſprudence. Theſe later determinations had rendered the old treatiſes of the law in a great degree obſolete. Bracton, tho' more full than any of the reſt, being more antient, afforded no light in that ſort of queſtions which were now uſually canvaſſed, and many of which had orginated intirely ſince his time: ſtill leſs was to be expected from Fleta, Britton, and The Mirroir, tho' of a later age. In this ſtate of things, it was an undertaking much to be wiſhed, that ſome one ſhould explain in a methodical way the new learning that had ariſen on the ſubject of tenures and eſtates. This our author has done, with a felicity which has placed him in a rank above all writers on the Engliſh law.

IF we enquire what is the excellence which has entitled this writer to ſo high a character, it will be found to be of a particular kind. It is not an accurate arrangement of his ſubject; not a remarkably apt diviſion of his matter; not a ſtrict adherence even to his own plan, by preſerving a cloſe connection between the matter and title of a chapter; in all which he is ſometimes more defective than writers of inferior note: the excellence of Littleton ſeems to conſiſt in the great depth of his learning, and ſimplicity of his manner; in a comprehenſive way of thinking, and a happy method of explaining; with a certain plainneſs yet ſignificance of ſtyle, that is always clear and expreſſive.

THIS

THIS author uſually quotes no authority for what he advances. In this, however, he does not differ much from his cotemporaries, who even in their arguments and opinions delivered in court, had not got into that practice of vouching authorities which has obtained ſo much ſince. Whenever he has a point to handle which is not thoroughly ſettled, he generally ſtates the different opinions on it, and then gives his own reaſons for differing or agreeing with either: and where he does not deliver an opinion declaredly his own, the laſt is ſuppoſed to be that which he is inclined to adopt. This open and candid way of diſcuſſing, added to the known abilities of the author, acquired him great confidence with poſterity: any thing out of Littleton has been uſually taken upon that authority alone. Thus, the want of references, which at firſt might ſeem a want of authenticity, has in the end adminiſtered to the fame of this writer; as opinions which otherwiſe might be vouched from an adjudged caſe, are now wholly reſted on the words of Littleton.

THE undiminiſhed reputation which this author ſtill poſſeſſes, is owing principally to the choice of his ſubject. The law of tenures and eſtates, as underſtood in the time of Littleton, is at this day the beſt introduction to the knowledge of real property; and though great part of this volume is not now law, yet ſo intimately was the whole of that ſyſtem connected, that what remains of tenures cannot be underſtood without a knowledge of what is aboliſhed; and therefore the parts of Littleton which are now obſolete, are ſtudied both with profit and pleaſure. We may ſtill ſay what the author pronounced of his work in another reſpect: "Though certain things which are "moved and ſpecified in the ſaid book, are not altogether "law, yet ſuch things ſhall make thee more apt and able "to underſtand and apprehend the arguments and reaſons "of the law [k]."

[k] Litt. Epilog.

CHAP. XXV.
HENRY VI.
EDW. IV.

BESIDE this, the law of tenures and eſtates has always been thought the moſt natural entrance into the ſtudy of the law in general; this ſmall volume, therefore, became the firſt book which was put into the hands of the ſtudent; and while it was conſidered by practicers and the courts as a work of the higheſt authority, it was at the ſame time the inſtitute to Engliſh juriſprudence. Lawyers gave their earlieſt and lateſt application to the text of Littleton: every ſection and ſentence was weighed, and every propoſition conſidered in all its conſequences; it was tranſlated, commented, analyſed; every method was contrived to gain a complete knowledge of its contents. Perhaps no book, in any ſcience ſo confined as the municipal laws of any country muſt be, has more employed the labours of the learned and induſtrious. A writer, who was himſelf one of the greateſt ornaments of the law, and whoſe name never appears greater than when accompanied with that of our author, furniſhed the world with a very copious and minute commentary on this book; in which he has carried his attention to the import of every word ſo far, as to make intereſting remarks on his very *et cæteras*. The fame of Littleton has not been confined to this iſland. As the Norman lawyers made Glanville a model upon which to form their *couſtumier*, and give ſyſtem to their juriſprudence, a modern writer of that country has lately compoſed a comment on Littleton, as the beſt help towards illuſtrating the cuſtoms and laws of that Duchy [1].

[1] This commentator is M. Howard, advocate of the parliament of Normandy, whoſe edition of our older laws tracts we have had occaſion to conſider in another place. Vid. ant. vol. II 283 in the notes. It is unneceſſary to add any thing to what we there threw out with regard to this gentleman's qualifications to compoſe commentaries upon our laws. Upon the whole we are obliged to this foreigner; for if no Engliſh lawyer would write ſuch obſervations upon Littleton, none would be at the pains to give us a new edition of Fleta, Britton, and the Mirroir, with emendations of the numberleſs errors in their texts. The latter work will always be of uſe to the common lawyer, and the former is ſuch as will never miſlead him.

THE

CHAP. XXV.
HENRY VI.
EDW. IV.

THE learning of the law was thrown into a more methodical form than it had ever yet received, by *Statham*, who was a baron of the exchequer in the time of Edward IV. This was in his *Abridgement of the Law*; being a kind of digeſt, containing moſt titles of the law, arranged in alphabetical order, and compriſing under each head adjudged caſes, abridged from the year-books in a conciſe manner. The plan of this work was entirely new, and conceived with ſome judgment, though the execution was imperfect, and left open to improvement. The caſes are ſtrung together with reference to nothing but the time of their adjudication, without any regard to the connexion of their matter. With all its incompleteneſs, this muſt have been a very valuable work at the time it was compiled, when the helps to the law were few and confined. This Abridgement has ſerved as a model to others in later times; which, without the merit of originality, have ſurpaſſed their maſter's performance in method, preciſion, and extent. This work had the fate to be of leſs uſe than, perhaps, any performance that, in the nature of it, ſeemed to aim at ſuch general utility. It is very doubtful whether it was printed before Fitzherbert's Abridgement, which came out in 1514; and whether it was printed a little before or a little after, the need of it was intirely ſuperſeded by the latter work.

Lyndwode.

SOMEWHAT prior to theſe, a work of a more extenſive, certainly of a much more difficult and laborious, nature was produced on the ſubject of our eccleſiaſtical law. This was the *Provinciale* of William Lyndwode, official principal to archbiſhop Chicheley. The learned canoniſt has here digeſted under heads the ſubſtance of almoſt every conſtitution made in ſynods of the province of Canterbury, from the time of Stephen Langton down to archbiſhop Chicheley. The method he has taken is that of the decretals of Pope Gregory IX. ſo juſtly eſteemed the moſt ſyſtematic and valuable part of the canon law.

To

CHAP. XXV.
HENRY VI.
EDW. IV.

To this digeſt he has added a very copious and minute comment, replete with every illuſtration that could be furniſhed from an intimate acquaintance with the writings of foreign canoniſts, and a long experience in our own eccleſiaſtical courts. The comprehenſiveneſs of this, as well as the merit of its execution, has contributed to place Lyndwode much above his predeceſſor *John de Athona*, who had led the way in this walk of ſtudy, by his gloſs on the legatine conſtitutions of Otto and Ottoboni. With this diſtinction in favour of Lyndwode, theſe two writers have obtained great authority with poſterity: they are regarded both in the ſpiritual and temporal courts, as containing undeniable evidence of the practice and law of their reſpective periods; and as they were inſtrumental in fixing both in after-times, their works are conſidered as the depoſitories of the common law of the church and of the eccleſiaſtical courts.

Lyndwode, in following the arrangement of the decretals, has been thought to ſacrifice perſpicuity to method, for that the matter of our conſtitutions does not fall eaſily into the order into which he has endeavoured to force them. His ſtyle of commenting likewiſe is not leſs liable to exception. Surely no one was ſo apprehenſive as he appears, leſt a word of his text ſhould paſs without being thoroughly underſtood[m]. Every term has its comment; and rather than not ſay ſomething, he too often indulges himſelf in unneceſſary remarks and digreſſive details. This makes his gloſs extremely minute and deſultory; ſo that to read it at length is tedious, and to ſearch for information on a particular point, is generally a fruitleſs labour. Notwithſtanding theſe defects in Lyndwode, which too, perhaps, were the literary failings of the age in which he wrote, his labours have not been ſurpaſſed by any ſuperior ability or induſtry in later times. The pages

[m] Gibſ. Pref. 12.

of

of this old writer, and the ſtill older whom we have juſt mentioned, continued for many years the only teſtimonies of our eccleſiaſtical law. To methodiſe or illuſtrate the exiſting materials, or add to them by making public reports of adjudged caſes, are the two ways of promoting legal knowledge; in one of which the practicers in our eccleſiaſtical courts have done very little, and in the other nothing at all; ſo little did they improve the advantage given them by Lyndwode over the common-lawyers, who at that time had nothing of equal extent and utility on the practice of their courts [n].

Printing of law-books.

THE art of printing being introduced into England by Caxton about the cloſe of this period, we are naturally led to enquire what uſe was made of it towards propagating a knowledge of our laws and conſtitution; but ſuch has been the careleſſneſs of that age, or the deſtruction of time, that nothing very authentic can be obtained on the ſubject. The firſt book known to be printed by Caxton, in England, was the *Recuyel of the Hiſtoryes of Troy*, in 1471. While his preſs was employed in multiplying copies of Reynard the Fox, the Death of King Arthur, the Hiſtory of Charles the Great, and other popular fables, and hiſtories worſe than fables, there is no proof that the profeſſion of the law were indebted to him for one printed book. There is a copy of Lyndwode's Provincials, which having Caxton's mark, and Wynkyn de Worde's colophon, was certainly printed by the latter. The ſtatutes of Richard III. without name or date, tho' uſually attributed to Caxton, are equally doubtful. The ſame may be ſaid of the ſtat. 1, 2, and 3 Hen. VII [o]. The printers next in point of time were *Lettou* and *Machlinia*; who are ſuppoſed to have been Caxton's ſervants,

[n] This is ſaid upon a ſuppoſition, that by the lapſe of two hundred years, and the changes that had taken place in our law, Bracton had ceaſed to be of that uſe to practicers which he otherwiſe would have been.

[o] Typog. Antiq. pa. 98. 101. 104.

and

CHAP. XXV.
HENRY VI.
EDW. IV.

and had begun to print for themſelves in partnerſhip, in the years 1480 and 1481. There is an edition of Littleton's Tenures printed by theſe printers, without a date; and this book is ſuppoſed to have been put to the preſs by the author himſelf, who died in 1481. There is a book intitled *Vieux Abridgement des Statutes*, which, from the types and marks, is ſuppoſed to have been printed at the ſame preſs and at the ſame time. Theſe may therefore be conſidered as the firſt printers of law; though they had no patent or ſpecial authority for ſo doing. Some books are found with *Machlinia*'s name ſingly, and others are thought to be his, from comparing the letter and work: of the former kind, is the year-book 34 Hen. VI.; of the latter is the 33d, 35th, and 36th years of the ſame king [p]. To theſe may be added the ſtatutes of the firſt year of Richard III [q]. About the ſame time ſome ſtatutes were printed under the title of *Nova Statuta*, containing the ſtatutes concerning the Deſpencers, thoſe of Edward III. Richard II. Henry V. Henry VI. and thoſe of Edward IV. down to the 22d year. All the foregoing books were in folio [r].

Miſcellaneous facts.

THE flouriſhing ſtate of the law during this period may be collected from a ſhort account of the law-ſocieties, and ſome circumſtances relating to their members. We are told, that in the reign of Henry VI. there were ten leſſer inns, which were called *inns of chancery*, each containing at leaſt one hundred ſtudents, and ſome a great many more. Theſe were deſigned as places for elementary ſtudies: here they learned the nature of original and judicial writs, which were then conſidered as the firſt principles of the law: and for this reaſon theſe inns were denominated from the chancery. When young men had made ſome progreſs here, and were more advanced in years, then they were admitted into the *inns of court*. Of theſe there were four in number, which we have before men-

[p] Typog. Antiq. 111, 112, 113. [q] Ibid. [r] Ibid. 114, 115.

tioned

tioned in the reigns of Edward II. and III *. The leaſt of theſe, it is ſaid, contained two hundred ſtudents [s].

We are informed, by a writer of this time, that a ſtudent could not reſide in the inns of court for leſs than 28*l.* *per ann.* and proportionably more if he had a ſervant, as moſt of them had. For this reaſon, the ſtudents of the law were generally ſons of perſons of quality. Knights, barons, and the greateſt nobility of the kingdom, often placed their children here, not ſo much to make the laws their ſtudy, as to form their manners, and preſerve them from the contagion of vicious habits: for, ſays the ſame author, *all vice was there diſcountenanced and baniſhed, and every thing good and virtuous was taught there; muſic, dancing, ſinging, hiſtory ſacred and profane, and other accompliſhments* [t].

The degree of ſerjeant at law was conſidered in a very reſpectable light: none could be a judge in the king's bench or common-pleas but one who had been firſt a ſerjeant; nor was a perſon to be called to the degree of ſerjeant, till he had been in the general ſtudy of the law above mentioned at leaſt for ſixteen years, which probably meant from his firſt entrance at an inn of chancery. The ceremony and expence attending a call of ſerjeants was at this time very great: in general, about ſeven or eight were called at a time; and on that occaſion, ſays our author, there were revels and feaſting for ſeven days together, *as at a coronation.* The expence each ſerjeant was at ſeldom fell ſhort of 260*l.* out of which one-ſixth was uſually expended on rings. Sir John Forteſcue, to whom we are obliged for all this information, ſays, that it coſt him 50*l.* in rings: we may conjecture from this what the profits of practice muſt have been [u]. They were generally called the *king's ſerjeants*, becauſe they were

* Vid. ant. vol. II. 359; and vol. III. 152.

[s] Forteſc. de Laud. c. 49.

[t] Forteſc. de Laud. c. 49.

[u] Ibid. c. 50.

called

CHAP. XXV.
HENRY VI.
EDW. IV.

called to this honour by the king's writ; and they had a ſalary from the crown, as well as the king's attorney.

It ſeems that learned apprentices were not always ambitious of the ſtate and degree of a ſerjeant; but, on the contrary, when called thereto, ſome of them had tried all ways to avoid it. There is an inſtance of this in the fifth year of Henry V. in John Martin, William Rabington, William Pole, William Weſtbury, John June, and Thomas Rolfe, ſix grave and famous apprentices, who having writs delivered to them to take the ſtate and degree of ſerjeant, returnable in Michaelmas term, and having in vain tried all means of evading the direction of the writ, upon the return thereof in chancery made an abſolute refuſal. Upon this they were called before the parliament, that was then ſitting, and there charged to take upon them the ſtate and degree of ſerjeants, which at length they conſented to do [x].

The king's attorney was the only law-officer of the crown of that kind till the reign of Edward IV. In the firſt year of that king we find *Richard Fowler* was made *ſolicitor* to the king [y], and in 11 Ed. IV. *William Huſee* was appointed *attorney-general* in England (the firſt mention we have of this title), *attornatus generalis in Angliâ cum poteſtate deputandi clericos ac officiarios ſub ſe in quâlitercunque curiâ de recordo* [z]. This officer uſed to be appointed for life.

There were uſually in the court of common-pleas five judges, ſometimes ſix, but never more; in the king's bench there were ſometimes four, ſometimes five. It is ſaid that they did not ſit above three hours a day in court, and that was from eight in the morning to eleven. The courts were not opened in the afternoon; but that time, ſays our author, was left unoccupied, for ſuitors to con-

[x] Rot. Parl. An. 5 Hen. V. 2 Inſt. 24.
[y] Dudg. Chro. Series. 67.
[z] Ibid. 71.

ſult

ſult with their counſel at home [a]. The ſame writer ſpeaks of the qualifications of a judge as not to be attained but *per viginti annorum lucubrationes.*

THE ſalaries of the judges in the time of Henry IV. were as follow: The chief baron and other barons had 40 marks *per ann.*; the chief of the king's bench and of the common-pleas 40*l. per ann.*; the other juſtices in either court 40 marks [b]. But the gains of the practicers had become ſo great, that they could hardly be tempted to accept a place on the bench with ſuch low ſalaries: therefore in 18 Hen. IV. the judges of all the courts at Weſtminſter, together with the king's attorney and ſerjeants, exhibited a petition in parliament concerning the regular payment of their ſalaries, and perquiſites of robes. The king aſſented to their requeſt, and order was taken for increaſing their income, which afterwards became larger, and more fixed: this conſiſted of a ſalary, and an allowance for robes. In 1 Ed. IV. Markham the chief juſtice of the king's bench had 170 marks *per ann.* penſion, 5*l.* 6*s.* 6*d.* for his winter robes, and the ſame for his Whitſuntide robes; *juxta formam* (ſays the record) *cujuſdam actus in parliamento* 18 Hen. VI [c]. Moſt of the judges had the honour of knighthood; ſome of them were knights-banneret, and ſome had the order of the Bath [d].

THE following is the ſtate of the *Hoſpitia*, or Inns, for the reſidence of profeſſors of the law in the time of Henry VI.

PART of Serjeant's Inn, in Chancery-lane, was inhabited by ſome ſerjeants in the time of Henry IV. when it was called *Faryndon's Inn*: the inheritance of it belonged to the biſhops of Ely. In the reign of Henry V. the whole houſe was demiſed to the judges, and apprentices of the law, as appears by ſums accounted for to the biſhop. In 9 Henry VI. it obtained the name of *Hoſpitium*

[a] Forteſc. de Laud. c. 51.
[b] Dudg. Orig. 105.
[c] Dudg. Orig. 109.
[d] Ibid. 103.

Juſtitiariorum:

CHAP. XXV. HENRY VI. EDW. IV.

Juſtitiariorum. In 2 Rich. III. there is a leaſe of it under the name of *Hoſpitium vocatum Serjeant's Inn*; this demiſe is at 4*l. per annum.* It appears in 21 Hen. VI. that the ſerjeants then, if not before, held Serjeant's Inn, in Fleet-ſtreet, under a demiſe from the dean and chapter of York, at the rent of 10 marks *per annum*[e]. There was alſo *Scrope's Inn*, inhabited by ſerjeants, which was ſometimes called Serjeant's Inn. This was an inn during the reign of Richard III. and was next to Ely-houſe, oppoſite St. Andrew's church, in Holborn[f].

THE *inns of court* were the four which have already been mentioned[g]. The ten *inns of chancery* in the reign of Henry VI. were the following: *Clifford's Inn*, which was an inn of chancery as early as the reign of Henry V. and had the ſign of the black lion. *Clement's Inn* was a reſidence for ſtudents in the reign of Henry IV. if not before. *New Inn* had been a common inn for travellers, and, from the ſign of the Virgin Mary, it was ſometimes called Our Lady's Inn. This houſe was inhabited by the ſtudents who removed from an old inn of chancery, called *George's Inn*, near St. Sepulchre's church without Newgate. *The Strand Inn*, otherwiſe Cheſter Inn, from its neighbourhood to the biſhop of Cheſter's houſe. This inn, together with the church of St. Mary le Strand, was pulled down in Edward the VIth's time, to make room for building Somerſet-houſe. *Thavies Inn*, we have ſeen was a reſidence for ſtudents in the reign of Edward III. It was granted in fee to the benchers of Lincoln's Inn in Edward the VIth's time. *Furnival's Inn*, which once belonged to the lords Furnival, was an inn of chancery in 9 Hen. 4. The ſtudents held it under a leaſe: in the time of Edward VI. the inheritance was in the then lord Shrewſbury, who ſold it to the ſociety of Lincoln's Inn, under whom the ſociety of Furnival's Inn were afterwards

[e] Dugd. Orig. 326. [f] Ibid. [g] Vid. ant. 121.

tenants.

tenants. *Staple Inn* was an inn of chancery in the time of Henry V. The inheritance of it was granted in 20 Hen. VIII. to the ſociety of Gray's Inn. *Barnard's Inn* was a law-ſociety in the time of Henry VI. The tenth was perhaps *George's Inn* beforementioned.

THESE inns of chancery became all of them appendages to one or other of the inns of court: of theſe, ſeven only are now ſubſiſting; Strand Inn being taken down in the reign of Edward VI.; George's Inn long before; and Thavies Inn within theſe few years.

CHAP.

CHAP. XXVI.

EDWARD V. RICHARD III.

1483–1485

Ceſtui que uſe to make eſtates—Benevolences aboliſhed—Bailing Felons by juſtices—Fines—Private Acts.

CHAP. XXVI. EDW. V. RICH. III.

THE ſmall ſpace filled by theſe two kings did not paſs without leaving ſome remembrances of it on our juridical polity. The tranſient reign of the firſt gave no time for calling a parliament, but the proceedings of the courts went on at their ſtated ſeaſons, uninfluenced by the revolutions that now happened with a rapid ſucceſſion in political affairs; and there have been handed down caſes *de termino Trinitatis, anno primo Edward Quinti.*

HIS ſucceſſor ſummoned a parliament in the firſt year of his reign, in which ſeveral acts were paſſed; and there are reports of two terms, Michaelmas in the firſt and Michaelmas in the ſecond year of Richard III. In Richard's parliament ſome ſtatutes of no ſmall importance were enacted; that concerning *ceſtui que uſe* had an extenſive effect on uſes during the next reign, and great part of the ſucceeding; thoſe about bailing and fines were thought ſuch good regulations, that the policy of them was adopted in the next reign, and they were ſuperſeded by two improved ſtatutes made for the ſame purpoſe. The ſtatute againſt benevolences might be ranked with the ſtatute *de tallagio non concedendo*, and other ſecurities againſt levying money without parliament. We ſhall now conſider theſe acts more particularly. The firſt three acts of this king were, firſt, for enabling *ceſtui que uſe* to diſpoſe of the land;

land; ſecondly, to relieve the ſubject from benevolences; thirdly, for letting priſoners to bail.

We have ſeen the expedients which had already been reſorted to for correcting the difficulties that followed from conveying land to a uſe[a]. But the evil was ſtill felt, and was complained of in the preamble of this act as exiſting in all its force. It was ſaid, "that no man "buying lands, tenements, rents, ſervices, or other here- "ditaments, nor women who had jointures, or dowers, "nor mens' laſt wills to be performed, nor leaſes for term "of life or ofyears, nor annuities granted for term of life "or otherwiſe, nor perſons intereſted in any of theſe ſpe- "cies of property, could be in ſafety, becauſe of privy and "unknown feoffments:" the meaning of which was, that after a feoffment or gift was made by the apparent owner of the eſtate, it would turn out that he was only *ceſtui que uſe*, and therefore not enabled by law to do any act which could charge the freehold. It was therefore, to remedy this, now enacted, that every feoffment, eſtate, gift, grant, leaſe, confirmation, and leaſes of lands, tenements, rents, ſervices, or hereditaments, made by any perſon of full age and at large, and all recoveries and executions ſo had or made, ſhould be good and effectual againſt the feoffor and his heirs, and thoſe claiming any intereſt to their uſe. Thus was the *ceſtui que uſe* empowered to diſpoſe of the eſtate, in the ſame manner as the *feoffee to the uſe* might at common law. It will ſoon be ſeen, that this new expedient to remedy the inconvenience of uſes, only produced the additional confuſion which muſt naturally follow when two perſons had an equal right to diſpoſe of the ſame land.

Ceſtui que uſe to make eſtates.

The ſecond chapter of this act declares, that the *benevolences* heretofore enacted ſhould not be drawn into example, but that exactions of that ſort ſhould no longer be levied.

Benevolences aboliſhed.

[a] Vid. ant. vol. III. 275.

CHAP. XXVI. EDW. V. RICH. III.

levied. These *benevolences* had been introduced by Edward IV. and the abolition of this mode of raising money was an attempt of Richard to conciliate to him the nobility and great men, who were the principal sufferers in these involuntary donations to the crown.

Bailing felons by justices.

The third chapter of this act complains, that persons were daily arrested and imprisoned for felony, sometimes through malice, and sometimes on light suspicion, and so kept without bail or mainprise, to their great vexation and trouble. The old remedy in some of these cases was the writ *de odio et atiâ*; in others, they had no resource but the discretion of the sheriff, who acted under the authority of stat. Westm. 1 [b]. To furnish persons so oppressed with a more speedy and easy redress, it was now provided, that every justice of the peace should have authority by his discretion to let such persons to bail or mainprise, in the same manner as if they had been indicted before the justices at the sessions. Power was also given to the justices to enquire in their session of the escapes of all persons arrested and imprisoned for felony. It was further enacted, that no sheriff, under-sheriff, escheator, bailiff, or other person should seize the goods of one who was arrested or imprisoned for felonies, before conviction or attainder, upon pain of forfeiting, to the person grieved, double the value of the things so taken; which regulation was in confirmation of the law of former times [c]. The provision made by this statute about bailing, was re-considered in the next reign, when a new act was made.

Fines.

ANOTHER remarkable provision made during the short reign of this king was the statute of fines, which like the preceding served as a model for another act in the next reign on the same subject. This statute is chap. 7. of Richard III. It refers to the statute *de finibus*; and, to increase the great security and confidence reposed in fines,

[b] Vid. ant. vol. II. 131. [c] Vid. ant. vol. III. 141. and vol. II. 24.

it

it enacts, that, after the engroſſing, every fine ſhould be openly and ſolemnly read and proclaimed in court the ſame term, and the three next terms; during which ceremony all pleas ſhould ceaſe; and then a tranſcript ſhould be ſent from the juſtices to the juſtices of aſſiſe of the county where the lands lay, who were in like manner to cauſe it to be proclaimed in every one of their ſeſſions that year; the ſame of the juſtices of the peace; which proclamations were to be certified the ſecond return of the following term. After theſe proclamations and certificates, ſuch fine was to conclude as well privies as ſtrangers, except women covert not parties to the fine, perſons within age, in priſon, out of the realm, or not of whole memory; with a ſaving of the claims of all others having a title at the time of the fine being levied, ſo as they proſecuted their claim, by action or entry, in five years after the proclamation and certificate; and alſo ſaving the rights of thoſe upon whom a title deſcended after the fine, provided they purſued their right in five years after ſuch title came to them; or, if the perſons were under any diſabilities or defects, within five years after the removal thereof. The ſtatute has a clauſe enabling perſons to levy fines according to this act, or at the common law.

THE other acts of this reign that are at all of a juridical nature, are the following: one was to declare that wherever the king was co-feoffee of lands to the uſe of the feoffor, the land ſhould be in the co-feoffees; which was to prevent the concluſion of law that would give, in ſuch caſe, the whole to the king [p]: another required a certain qualification of property in jurors who ſerved in the ſheriff's tourn [q]. The remaining acts related principally to trade and commerce.

THE diſtinction between *private acts* (whoſe origin we have conſidered in the preceding period*) and *public*, was

[p] Ch. 5. [q] Ch. 4. * Vid. ant. vol. III. 379.

CHAP. XXVI. EDW. V. RICH. III.

first made in the reign of Richard III. who applied this new invention to the purpose of destroying his enemies by parliamentary attainders. All Richard's statutes are in English; and so they continued to be drawn in all subsequent periods. When the parliament of Richard is considered in all these lights, it becomes an object of some note in juridical history.

CHAP.

CHAP. XXVII.

HENRY VII. 1485–1509

Attending the King in his Wars—Vagrants—Corporations—Statute of Fines—Statutes of Pernors of Profits—Alienations of Jointreſſes made void—Suits in Formâ Pauperis—Attaints—Stealing Women—The Star-Chamber new-modelled—Informations at the Aſſiſes and Seſſions—Appeal of Murder—Bailing Felons by Juſtices of the Peace—Benefit of Clergy—Bargain and Sale—Of Uſes—Covenants to ſtand ſeiſed—Ejectione Firmæ—Actions of Aſſumpſit—The Chancery—Of Treaſon—Larceny—Sanctuary—King and Government—Printing of Law-Books—Miſcellaneous Facts.

CHAP. XXVII. HENRY VII.

THE reign of Henry VII. exhibits ſome remarkable inſtances of innovation upon the old law. The benefit of clergy was taken from offenders of a certain deſcription; and regulations were made for qualifying that ancient exemption, ſo as to promote a better adminiſtration of criminal juſtice. Among the deciſions of courts, there was one concerning the action of ejectment, which had the effect of bringing about a conſiderable change in the courſe of legal remedies for recovering land. Theſe were perfectly novel, and gave riſe to a new ſet of principles and ideas in the law of property and of crimes. Other productions of this reign, though only modifications of former eſtabliſhments, are not leſs famous in the hiſtory of our juriſprudence: ſuch is the ſtatute of fines, and that for new-modelling the ſtar-

CHAP. XXVII.

HENRY VII.

chamber. Many other points of great importance attracted the notice of parliament, or were agitated in the courts, which make the reign of this king a period well worthy the attention of the hiſtorical ſtudent.

In reviewing the legal tranſactions of this reign, we ſhall begin with the ſtatutes, as uſual; firſt noticing thoſe which relate to the king and the rights of perſons, and then proceeding to thoſe that affected the law of private rights. After the landing of Perkin Warbeck, in Kent, a law was made of a new impreſſion. Apprehenſive of the conſequence of ſuch attacks upon his title, Henry's friends prevailed on him to conſent to ſome ſecurity for them, in caſe of changes: this was done by ſtat. 2 Hen. VII. c. 1. which ordains, that no perſon who, in arms or otherwiſe, aſſiſts the king for the time being, ſhould afterwards be convicted or attainted thereof, as of an offence, by courſe of law, or by act of parliament; and all proceſs and acts of parliament to the contrary are declared void. This act is ſaid, by a learned and eminent writer[a], to be rather juſt than legal, and more magnanimous than provident. It ſeems, however, to have been founded on principles of humanity and good ſenſe.

Attending the king in his wars.

To throw a ſplendor round the crown, Henry had reſolved, that all perſons bearing any relation to the king ſhould be about him in his expeditions; and we find two ſtatutes made for this purpoſe; the firſt was ſtat. 11 Hen. VII. c. 18. which required all thoſe who had any office, fee, or annuity, by grant from the crown (not having the king's licence to excuſe, or any infirmity to prevent them), to attend the king in perſon when he went to war; and if they failed, all ſuch grants were to be void. This was not to extend to any ſpiritual perſon, the maſter of the rolls, nor officers or clerks in chancery, or the juſtices of either bench; nor to the barons of the exchequer, or other officers of their courts; the king's attorney or

[a] Lord Bacon.

ſolicitor,

ſolicitor, or his ſerjeant at law. This point was puſhed further a few years after by ſtat. 19 Hen. VII. c. 1. and extended to thoſe occupying honours, caſtles, lordſhips, manors, lands, tenements, or other poſſeſſions and hereditaments of the grant of the crown; who were thought to be bound by a ſtronger duty than thoſe of the former deſcription. By this act ſuch perſons are intitled to the king's wages from their ſetting out to their return. The exceptions, in this latter act, were extended to the clerk of the king's council, to perſons above ſixty and under twenty-one years, and to caſes where the patents mentioned the grant to be for a ſum of money [b].

PARTICULAR privileges had before this been granted by parliament to perſons in the king's ſervice. Perſons in the king's wages beyond or upon the ſea, were not to be prejudiced by any deſcent, and might make their attorney to enter lands deſcended, or to attorn. Thoſe with the king in his wars, might make feoffments to the uſe of their wills without licence; they were to have their own liveries, and they had authority to diſpoſe of the wardſhip of their lands [c]. While Henry was thus ſteady in exacting due attendance from the retainers of the crown, he was equally attentive to diminiſh the number of thoſe of great lords. He was very ſtrict in enforcing the ſtatutes of liveries. The parliament added two more to the number of theſe regulations for leſſening the influence and ſtrength of the nobility in the country [d].

THESE were all the parliamentary proviſions that ſeem to concern more particularly the king's perſon, and do not come under any of the heads under which the other acts of this reign will be arranged. Before we come to thoſe on private rights, we ſhall briefly notice cer-

[b] Theſe laws cannot but bring to our recollection ſome former paſſages in our Hiſtory. Vid. ant. vol. II. 104.

[c] Stat. 7 Hen. VII. c. 2, 3.

[d] Stat. 3 Hen. VII. c. 12. and ſtat. 19 Hen. VII. c. 14.

tain

CHAP. XXVII.

HENRY VII.

tain laws that were made for better regulating the lower orders of the community, and one that reſpects bodies politic and corporate.

Vagrants.

IT is probable that the ceſſation of the late civil conteſts had left many unemployed perſons to become vagrants and infeſt the country; for we find two ſtatutes for the correction of this evil, which ſeem to treat it with much ſeverity. Vagabonds, idle and ſuſpected perſons, were to be ſet in the ſtocks three days and three nights, without any ſuſtenance but bread and water; after which they were to be put out of the town. It was enjoined, that no one ſhould give any thing elſe to ſuch idle perſon, under the penalty of forfeiting a ſhilling. Poor perſons not able to work were to reſort to the hundred where they laſt dwelt, were beſt known, or were born, and there remain, under the penalty of being puniſhed in the abovementioned way. To ſuppreſs the nurſeries of idleneſs and beggary, it was provided, that no artificer, labourer or ſervant, ſhould play at any unlawful games, except in Chriſtmas. The common ſelling of ale might be checked by two juſtices of the peace[e]. Several laws were made for the adjuſtment of trade and commerce, the employment of perſons in agriculture, the building of houſes of huſbandry, the regulating of the wages of artificers, the apprenticing of boys, and other objects of an œconomical kind; but theſe were moſtly experimental, and led to improvements of a more general nature, in the next and ſubſequent reigns[f].

THAT corporations might not carry the right they had to make bye-laws too far, it was ordained, by ſtat. 19 Hen. VII. c. 7. that all acts and ordinances made by the wardens, maſters, and fellowſhips of crafts and myſteries, and by rulers of guilds and fraternities, ſhall be

[e] Stat. 11 Hen. VII. c. 2. ſtat. 19 Hen. VII. c. 12. Vid. ant. vol. III. 169. 223.

[f] Stat. 11 Hen. VII. c. 22. ſtat. 4 Hen. VII. c. 19.

approved

approved by the chancellor, treaſurer, or chief juſtices of either bench, or three of them; or by the juſtices of aſſize in their circuit; and that otherwiſe they ſhould be void. It was further ordained, that no bye-law ſhould be made to reſtrain ſuits in the king's courts.

THE ſtatutes made in this reign upon the ſubject of private rights related intirely to the modes and circumſtances of alienation, whether in real or perſonal property. Of this nature were the ſtatute of fines, thoſe relating to the pernors of profits, and an act to prevent the alienations of jointreſſes. The only act reſpecting perſonalty which we ſhall have occaſion to notice, is that for preventing gifts of goods in order to defraud creditors. The moſt remarkable regulation in this reign on the ſubject of real property is the ſtatute of fines, 4 Hen. VII. c. 24. copied chiefly from that in the laſt reign. This act has been conſidered in two views; either as intended to make a fine a bar to an entail, or to give to this antient aſſurance the force and validity it poſſeſſed at common law before the ſtatute of non-claim.

Statute of fines.

THOSE who are of the former opinion argue in this way: Notwithſtanding, ſay they, the blow that was given to the ſtatute *de donis* by the determination in *Taltarum*'s caſe, the effects of entails were viewed with a jealous eye by this king. It ſhould ſeem, ſomething more was wiſhed than this reſolution to ſubſtantiate ſo bold and new a doctrine as that of barring entails, and virtually repealing an ancient ſtatute, upon which the landed property of the kingdom had been ſettled for years. Henry ſaw that the conſequence of a free power of alienation would be a gradual decline of the wealth and importance of the nobility, and a proportionate increaſe in that of the Crown; and knowing how much this concurred with his favourite ſcheme of aggrandizement, he procured the ſtatute of fines to be paſſed.

THOSE

CHAP. XXVII.

HENRY VII.

THOSE who are of the latter opinion, deny that this ſtatute was dictated by political reaſons; and maintain, that conſiderations ariſing from the nature of a fine, as a common aſſurance of the realm, were the only motives for making it. By the ſtatute of *modus levandi fines*, 18 Ed. I. claim muſt be made within a year after the fine levied by the perſon next immediately having right, without permiſſion to thoſe in the ſubſequent remainders to claim on his default; ſo that if there was tenant for life, remainder for life, remainder in fee, and the firſt tenant for life aliened, and the next remainder-man for life made no claim, the remainder-man in fee was without remedy. This miſchief was one of the great cauſes of making ſtat. 34 Ed. III. c. 16 [g]. by which non-claim was ouſted; that is, a perſon's right was no longer barred by his not making his claim within the year. An example of this kind had been given by the ſtatute *de donis*; the intereſt of the donor was there provided for by a clauſe much in the nature of this: it was ordained, that it ſhould not be neceſſary for the heirs in tail, or for thoſe in reverſion, to put in claim. Great cauſe of the ſtatute of non-claim was the interruption of foreign and domeſtic wars, which prevented people from attending to matters of property.

WHATEVER wiſdom may be aſcribed to the policy which dictated that ſtatute, it was found that this doctrine of non-claim had very miſchievous conſequences. Fines, as they thus lay open to be queſtioned, became of leſs validity and effect, and were virtually very little more than feoffments of record. To remedy the endleſs conteſts and litigation to which eſtates were now expoſed, and to reſtore fines to their former efficacy, were, as it ſhould ſeem, the principal objects of ſtat. 4 Hen. VII. The makers of this act appear only to have purſued the

[g] Vid. ant. vol. II. 401.

reaſon

reaſon of the common law, and to have intended merely to put fines into the ſame condition they were in before non-claim was ouſted.

SUCH are the reaſons and motives ſuggeſted by different perſons for making this famous act. It muſt be confeſſed, that if there was any intention of giving to a fine the efficacy of barring an entail, the ſtatute is couched in thoſe covert and indirect terms which indicated an apprehenſion of ſome remaining prejudices in favour of entails; for, without any apparent reference to entails, or the declaration of the ſtatute *de donis*, that fines, as againſt the iſſue, ſhould be void, it enacts generally, "that fines of land levied with proclamation ſhall conclude *as well privies as ſtrangers*." On the other hand, there is in the preamble mention made of the ſtat. 27 Ed. I. *de finibus*, and of the confuſion introduced by the ſtatute of non-claim, to remedy which it would intimate the preſent act was deſigned; and it was not till near forty years after, that a fine with proclamation was held to bar the iſſue, by conſtruction of this act[h]; and that was with ſuch difference of opinion, that an act was purpoſely made ſome years after[i] to declare ſuch a fine to be a bar to the iſſue. It may be added, that this act is only copied from one paſſed in the reign of Richard III. who had no leiſure to deviſe ſchemes for impoveriſhing or humbling the nobility. This republication, therefore, can hardly be attributed to any perſonal deſign originating with the preſent king.

FINES levied according to this ſtatute, and to have the effect here given them, were to be ſolemnly read and proclaimed in the three terms next following the ingroſſing, at four days in every term, during which proclamation all pleas were to ceaſe. There is a ſaving of the rights of ſuch as might not be in a condition to vindicate their claims; ſuch as femes covert (not being parties to the fine), perſons

[h] 19 Hen. VIII. 6. [i] Stat. 32 Hen. VIII. c. 36.

under

CHAP. XXVII.

HENRY VII.

under twenty-one years, perſons in priſon, out of the realm, or not of whole mind, at the time of the fine levied, not being parties to the fine; and a ſaving to every perſon and his heirs, other than the parties thereto, of ſuch right as he had at the time of the fine being ingroſſed, ſo as he purſue his title within five years next after the proclamation had; and ſaving to all perſons ſuch right as ſhall firſt grow, remain, or deſcend, or come, after the fine ingroſſed and proclaimed, by any gift in tail, or other cauſe, before the fine levied, ſo that they purſue their right within five years after it accrued to them; and then they and their heirs might have an action againſt the pernors of the profits of ſuch lands. But if at the time of ſuch right accruing they were covert baron, within age, in priſon, out of the land, or not of whole mind, then their right and action ſhould be reſerved to them and their heirs till they come to twenty-one years, be out of priſon, within this land, uncovert, and of whole mind, ſo that they or their heirs take their action or entry within five years after ſuch diſability removed, and purſue ſuch action or entry. All perſons having a right, and being under the above diſabilities at the time of a fine being levied and ingroſſed, ſhall take their action or entry within five years after ſuch diſability is removed, and purſue ſuch action and entry: if not, they and their heirs ſhall be barred for ever, as if they had been parties or privies. There was a ſaving to every one, not party or privy, to alledge in avoidance of a fine, that neither the parties, nor any to their uſe, had any thing in the lands or tenements compriſed in the fine at the time it was levied. Laſtly, it was provided, that fines, levied in the form uſed before this act, ſhould be as effectual as if this ſtatute had never been made; and all perſons ſhould be at liberty to follow that form, or the form preſcribed by this act.

SUCH are the proviſions of this famous ſtatute, which is one of thoſe inſtances where the old law, after ſome changes, was revived, and one of the principal aſſurances

of

of eſtates placed upon its antient foundation. This ſtatute, whether conſidered as a regulation for quieting poſſeſſions, or for barring entails, became in after-times an object of very frequent and very ſerious diſcuſſion.

Statutes of pernors of profits.

THE inconveniencies ariſing from the univerſal practice of conveying land to uſes, were felt more and more; and the legiſlature were frequently ſtruggling to remedy, if poſſible, the extreme difficulties under which creditors and purchaſers, lords, and thoſe who had title, laboured, from the ſecret and dormant claims to which land became thereby ſubjected. With a view to remedy theſe evils, the number of ſtatutes againſt pernors of profits was increaſed in this reign [k]. It was provided, by the very firſt ſtatute in this reign, that *ceſtui que uſe* ſhould anſwer to a formedon, and the ſuit be conducted in the ſame manner as if he was ſeiſed of the land. It has been doubted by ſome, whether a formedon did not lie before this ſtatute [l]. A like redreſs, ſimilar to that of the ſtatute of Marlbridge [m], was provided in favour of the lord; who was enabled, by ſtat. 4 Hen. VII. c. 17. to eſtabliſh his right to wardſhip and relief againſt the heir of *ceſtui que uſe*, if no will was declared, as if the heir were very tenant; and the heir, on the other hand, was furniſhed with means of redreſs againſt the lord for waſte committed, and was entitled to damages againſt him, if barred in a writ of ward. By ſtat. 19 Hen. VII. c. 15. the ſheriff is authorized to make execution of the lands, tenements, or hereditaments of *ceſtui que uſe*, the ſame as if he was ſeiſed thereof, for all judgments, ſtatutes and recogniſances. Lords of whom ſuch lands were held in ſocage, were on the death of *ceſtui que uſe*, and no will declared, to have their relief of heriot, and other dues. On the other hand, *ceſtui que uſe* was to have all advantage againſt the perſon ſuing the execution, as if he was ſeiſed of the land.

[k] Vid. ant. vol. III. 275.
[l] *Bro. Pernor des Profits*, 14.
[m] Vid. ant. vol. II. 62.

If

CHAP. XXVII.

HENRY VII.

If a bondman purchaſed any land or tenement, and made an eſtate to others to his uſe, the lord was enabled to enter, the ſame as if the bondman was ſeiſed of the land.

Alienation of jointreſſes made void.

THERE was another ſtatute made concerning real property, which deſerves notice. It was found neceſſary to remedy an abuſe that had been practiſed by widows, while in poſſeſſion of their dower, or of what has ſince been called a jointure. They were in this manner ſeiſed of the freehold, and conſequently of all the privileges annexed to it; and could therefore exerciſe a right over it, which laid thoſe next in ſucceſſion quite at their mercy. To prevent this, it was enacted, by ſtat. 11 Hen. VII. c. 20. that if any woman, having an eſtate in dower, or for life, or in tail, jointly with her huſband, or ſolely to herſelf, of the inheritance or purchaſe of her huſband, or given by any of his anceſtors; if a woman, having ſuch eſtate, ſhould, either when ſole, or when married to a ſecond huſband, diſcontinue, alien, releaſe, or confirm with warranty, or by covin ſuffer a recovery, it ſhall be void; and the perſon next intitled, after the woman's death, may enter and enjoy the land the ſame as if ſuch woman was actually dead. There is a proviſion, that a woman may alien for her own life, and if the perſon next intitled agrees to it, ſhe may alien for any greater eſtate. However, the widow was prevented from making a property of that which had been allotted to her for an honourable proviſion during life; and the reverſion to the heirs of the huſband and his family was effectually ſecured.

THERE is only one ſtatute relating to the right of perſonal property, which much deſerves our notice; that is, ſtat. 3 Hen. VII. c. 4. which was made to prevent the frauds committed on creditors by perſons, who, having made deeds of gift of their effects, would fly to ſanctuary and other privileged places, and there live upon their property, in defiance of thoſe who had demands on them. It

was

was enacted by this ſtatute, that all deeds of gift of goods and chattels in truſt for and to the uſe of the perſon making them, ſhall be void.

We ſhall now ſpeak of ſuch ſtatutes as made any alteration in the courſe of adminiſtering juſtice. Theſe were not many; but yet, together, contributed either to render the means of obtaining juſtice more ready, or delays leſs incommodious. They related to writs of error, popular actions, ſuits *informâ pauperis*, attaints, and the proceſs in actions upon the caſe.

It was intended by ſtat. 3 Hen. VII. c. 10. to prevent a litigious ſtay of execution by writ of error. It ordains, if a defendant or tenant brings a writ of error, and the judgment be affirmed, or the writ be diſcontinued, or the plaintiff in error nonſuited, he ſhall pay coſts and damages to the other party for the delay and wrongful vexation, by diſcretion of the court where the writ of error is depending.

The ſtat. 4 Hen. VII. c. 20. reſpecting popular actions, as it had a view to the emoluments of the exchequer, bore in it a ſtriking mark of the genius of this reign. It had become the practice of government to enforce with rigour ſuch penal laws as contributed to the increaſe of forfeitures and penalties; and every thing which prevented the full effect of ſuch laws, was to be removed. It was common for offenders to get a friendly action brought againſt them for the penalty they had incurred; or if an adverſe plaintiff had commenced a ſuit, they would get a friend to ſue them, and by this colluſion would confeſs a judgment to him, and plead that in bar of the other action. To prevent the effect of ſuch practices, it was provided by this ſtatute, that in the like caſes the plaintiff may reply covin, and have judgment and execution as if no other action had been brought; and where the colluſion is proved on the defendant, he is to ſuffer impriſonment. It was further provided, that no releaſe of any popular action by a private perſon

CHAP. XXVII.

HENRY VII.

perſon ſhould be a bar to ſuch action or indictment. Colluſion was not to be replied, where the point of the action had been tried, and a verdict had.

Suits in *formâ pauperis.*

ALLOWING perſons to ſue *in formâ pauperis*, as was done by ſtat. 11 Hen. VII. c. 12. was a humane conſtitution, and reſembled more the legiſlation of an imaginary republic than the practice of actual government. It was ordained that every poor perſon ſhould have original writs and writs of *ſubpœna* without paying for the ſealing or writing thereof; and the chancellor was for that purpoſe to aſſign clerks, learned counſel, and attornies. If the writ was returnable before the juſtices of any court of record, they were alſo to aſſign counſel and attornies, to act without a fee. This indulgence may, however, be thought by ſome to be dangerous, and to need that caution and reſtriction which by a later act has been annexed to this privilege. To enable one to commence a litigation without expence, is tempting the reſentments of men with too eaſy a gratification; and the defendant in ſuch a ſuit is left in an unequal conteſt.

Attaints.

ATTAINTS, tho' in the nature of a criminal proceeding, may be mentioned in this place among the improvements made in civil proceſs; as they were deſigned for the purpoſe of rendering the trial by jury as incorrupt and effectual as the nature of it would allow. It was now endeavoured to put attaints upon a different footing than they had been on before. Attaints had become very dilatory, laſting ſometimes ten years[n], and were attended with great expence, as well as impediment, in the conduct of them. Theſe conſiderations, with that of the extreme rigour of the villainous judgment, induced perſons rather to endure the injury they received from a falſe verdict, than be at the trouble of redreſſing themſelves in this manner, or contribute towards inflicting ſo cruel a puniſhment. As a ſub-

[n] Stat. 11 Hen. VI. c. 4. Vid. ant. vol. III. 276.

ſtitute

ſtitute for the ancient ſeverity, a new order of proceeding and another penalty was contrived by ſtat. 11 Hen. VII. c. 24. which ordained a pecuniary mulct inſtead of the opprobrious judgment of the common-law. This ſtatute being intended as an experiment, was temporary, and after ſeveral continuances of it in this reign, expired with it: in the next, a new one was made on the ſame ſubject [o]. Another temporary law had been made at the ſame time againſt perjury, maintenance, embracery, and corruption of officers [p]; crimes of the like nature with the corruption of jurors, and puniſhed by numberleſs proviſions in our early laws *. A particular act was made to correct the evil of corrupt jurors in the city of London, who heretofore were not liable to an attaint. It was provided by this act, that jurors there ſhould have certain qualifications of property, and that, on a falſe verdict, a bill of attaint might be ſued in the huſtings: if the jurors were convicted, they were to be fined 20*l.* or more, at the diſcretion of the court [q]; ſo that all idea of the villainous was intirely abandoned.

As actions upon the caſe had of late very much increaſed, and had ſupplied the place of many ancient remedies, it was thought they ſhould no longer be ſubject to the delay which was incident to the old proceſs. It was therefore enacted by ſtat. 19 Hen. VII. c. 9. that the like proceſs ſhould be in actions upon the caſe, as in actions of treſpaſs and debt, when ſued in the king's bench or common-pleas; for thoſe only are mentioned in the ſtatute. It ſhould ſeem, that actions upon the caſe in other courts, not being affected by this ſtatute, muſt be proſecuted with the common-law proceſs of attachment and diſtreſs, as before †.

AMONG the proviſions for improving the adminiſtration of juſtice, we muſt reckon a ſtatute for correcting ſome

[o] Stat. 23. Hen. VII. c. 3.
[p] 11 Hen. VII. 25.
* Vid. Ant. vol. II. 212.
[q] Stat. 11 Hen. VII. c. 21.
† Vid. ant. vol. II. 437. &c.

abuſes

CHAP. XXVII.

HENRY VII.

abuſes in the ſheriff's court. There was great extortion and colluſion practiſed by under ſheriffs and their clerks, and bailiffs; the principal of which was, the entering of plaints without the conſent of plaintiffs, and ſometimes where no ſuch perſons exiſted; after which they omitted to attach or ſummon the defendant, but left him to incur defaults, for which they made great levies upon him. To remedy this, no plaint was to be entered without pledges being found; a penalty of forty ſhillings was impoſed on the ſheriff if he entered more than one plaint for one treſpaſs or debt. The party grieved might complain to a juſtice of peace, who had authority to puniſh the ſheriff and his officers: ſeveral other directions were given for ſubmitting this miſchief to the correction of the juſtices of the peace [r].

THE alteration made in the law of crimes and puniſhments in this reign ſeems as remarkable, and of as extenſive conſequence, as any alteration reſpecting the law of property. The criminal code begun now to aſſume a ſanguinary appearance, which every reign ſince has been heightening.

THE changes made in our criminal law conſiſt either in the new crimes which the legiſlature created, or in ſuch regulations as were made for the adminiſtration of juſtice.

ONE treaſon was created in this reign. By ſtat. 4 Hen. VII. c. 18. it was made high-treaſon to counterfeit the coin of any foreign realm permitted to be current here. Another act was made to prevent the circulation of clipped and baſe coin; in which the exportation of bullion to Ireland, or the importation of gold or ſilver coin from thence, is puniſhed with impriſonment; that being the quarter from whence this commodity was moſt frequently conveyed to this kingdom [s].

THE hunting in parks with viſors and painted faces, was puniſhed by ſtat. 1 Hen. VII. c. 7. and if a warrant

[r] Stat. 11 Hen. VII. c. 15. [s] Stat. 19 Hen. VII. c. 5.

was

was iſſued againſt ſuch offender, and he wilfully concealed the offence, or reſiſted, or diſobeyed the warrant, he was guilty of felony.

Stealing women.

It was made felony by ſtat. 3 Hen. VII. c. 2. to take away any woman againſt her will unlawfully, whether ſhe be maid, widow, or wife; and the takers, procurers, abettors, and thoſe who receive ſuch women, are all made *principal* felons. A woman ſo taken muſt have ſubſtance in goods or lands, or be heir apparent, and muſt be married, or deflowered, to make the taking an offence under this act. There was a proviſo that this ſhould not extend to a perſon who took a woman claiming her as his ward, or bond-woman*.

The laſt new felony we ſhall mention was inflicted by ſtat. 3 Hen. VII. c. 14. which made it felony for any ſervant of the king, being inrolled in the cheque-roll, to compaſs or imagine the death of the king, or of any lord, or privy-councellor, ſteward, treaſurer, or comptroller of the houſhold. This offence is to be enquired of by twelve perſons, enrolled in the cheque-roll, before the ſteward, treaſurer, and comptroller of the houſhold. The puniſhing the bare intention to murder a lord, without any overt act declaratory of ſuch intention, makes this a very remarkable proviſion; the ſecurity of theſe perſonages being put on the ſame footing with that of the king. The occaſion of this is ſtated in the ſtatute; that ſuch malevolent deſigns among the houſhold ſervants lead to attempts which endanger the king himſelf; and that a recent fact of that kind had induced the parliament to make this ſtatute.

Some proviſions were made for the puniſhment of inferior offenders. A ſtatute was made for the ſuppreſſing of riots, and another for the better execution of former laws on that head†. The firſt penal law was now made againſt the canonical offence of uſury. Brokers of ſuch bargains were to be ſet in the pillory, impriſoned half

* Vid. ant. vol. III. 277.
† Stat. 11 Hen. VII. c. 7. and ſtat. 19 Hen. VII. c. 13.

CHAP. XXVII.

HENRY VII.

a-year, and fined twenty pounds [u]. Perſons lending money, or bargaining for lands, or goods, on uſury, were to forfeit half the value [x].

THE execution of penal laws was a ſubject much attended to by this prince. In order to accompliſh this end, the criminal juriſdiction of ſome antient courts was extended, and the courſe of proceeding was greatly facilitated. The moſt material changes of this ſort were made by ſtat. 3 Hen. VII. c. 1. and ſtat. 11 Hen. VII. c. 3. which, among proviſions of real and permanent utility, furniſhed ſome innovations that were afterwards diſapproved and abrogated.

THE firſt clauſe of ſtat. 3 Hen. VII. c. 1. made ſome alteration in the juriſdiction of the council, which had lately been more familiarly called the *ſtar-chamber*. The remaining part of that ſtatute is taken up with ſeveral proviſions relating to criminal juſtice, which we ſhall defer for the preſent.

The ſtar-chamber new-modelled.

THE criminal juriſdiction exerciſed by the king's council we have had occaſion to notice in the early periods of this Hiſtory; and it has been obſerved that they ſat in this capacity ſometimes *en la chambre des eſtoyers*, which had of late years become their moſt uſual place of ſitting; and therefore the council was now moſt commonly called the *ſtar-chamber* [y]. There are many inſtances where this tribunal had exerciſed its authority in the period immediately preceding the time of which we are now ſpeaking [z]. This judicature, in its original eſtabliſhment, was very extenſive, and comprehended a great variety of objects within its cogniſance. As the conſtitution of our legal polity became more ſettled, and the boundaries of juſtice more exactly defined, this extraordinary authority was in proportion circumſcribed. Several ſtatutes had been paſſed im-

[u] Stat. 3 Hen. VII. c. 6.
[x] Stat. 11 Hen. VII. c. 8.
[y] Vid. ant. 87. Lamb. Archeion, 149.
[z] Lamb. Archeion, 149 to 154. Inſt. 60, 61.

poſing

poſing reſtrictions on the acceſs of complainants to this extraordinary judicature [a]. But, notwithſtanding this apparent jealouſy of the council, the parliament had, at other times, gradually reſtored to it ſome of its ancient authority, by referring to that tribunal the cogniſance of many enormities which were before enquirable at common law, and which, as ſuch, were not to be examined by the council. Thus, compared with its original powers, the prerogative-judicature of the king in council was much reſtricted by poſitive conſtitutions; and from being, in ſome degree, above the law, had ſhrunk into a compaſs ſo ſmall, and had withal become ſo precarious in its foundation, that Henry, who meant to make much uſe of this court, thought it ſtood in need of ſome parliamentary ſanction to give it ſupport and authority. Theſe were the reaſons which probably led to enacting ſtat. 3 Hen. VII. c. 1. a ſtatute which did not erect, as ſome have imagined, but only *new-modelled* the court of *ſtar-chamber*. Indeed, the eſtabliſhment given to this court by the ſtatute of Henry, was partial, and confined to certain inſtances therein enumerated. The deſign, ſcope, and extent of this act will be beſt ſeen by a rehearſal of it.

The preamble ſtates, that "the king, remembering how by unlawful maintenances, giving of liveries, ſigns and tokens, and retainers by indentures, promiſes, oaths, writings, or otherwiſe, embraceries of his ſubjects, untrue demeanings of ſheriffs in making of pannels and other untrue returns, by taking of money by juries, by great riots and unlawful aſſemblies, the policy and good rule of this realm is almoſt ſubdued; and for the not puniſhing of theſe inconveniences, and by occaſion of the premiſes, little or nothing may be found by inquiry;" that is, by the ordinary proceeding by an inqueſt of jurors; "whereby the laws of the land in execution may take little effect, to

[a] Vid. ant. vol. III. 273.

CHAP. XXVII.

HENRY VII.

the increaſe of murders, robberies, perjuries, and unſureties of all men living," &c. for the reformation of which it was now ordained, that the chancellor, treaſurer, and privy-ſeal, or two of them, calling to them a biſhop and a temporal lord, being of the council, and the two chief juſtices, or, in their abſence, two other juſtices, upon bill or information put to the chancellor for the king, or any other, againſt any perſon for any miſbehaviour abovementioned, *have* authority to call before them by writ or privy-ſeal the offenders and others, as it ſhall ſeem fit, by whom the truth may be known; and to examine and puniſh after the form and effect of ſtatutes thereof made, in like manner as they ought to be puniſhed, if they were convict after the due order of the law.

THIS is the ſubſtance, and nearly the very words, of the ſtatute; which plainly point out the occaſion of this new regulation, the objects of cogniſance, the judges, the proceſs and proceedings, with the power of puniſhing; from which it is manifeſt, that the king's council derived from this ſtatute an enlargement of its judicial authority. There is nothing prohibitory of the former juriſdiction or mode of proceeding here; but that is, on the contrary, recognized, as it were, and affirmed by the very cautious manner in which the enacting part of this ſtatute is worded: for, inſtead of ſaying that thoſe great officers *ſhall* have authority, it barely declares that they *have* authority; thereby plainly intimating an apprehenſion of a pre-exiſtent authority, and only declaring more particularly the exerciſe of it in ſome certain caſes.

IT ſhould ſeem, that whereas, before this ſtatute, the king and council did not admit any complaint but ſuch only as carried with it, according to *Lambard*'s expreſſion, a reaſonable ſurmiſe of maintenance of their juriſdiction [b]; for proof alſo of which the complainant ought by ſtat. 15

[b] Lamb. Archeion. 167.

Hen.

Hen. VI. c. 4. to give ſureties; now, by this act, beſides that ancient authority, three only of the council, namely, the chancellor, treaſurer, and privy-ſeal (taking to their aſſiſtance others thereby appointed), were enabled to hear and determine ordinarily of thoſe eight offences above-mentioned, and that without any manner of ſuch ſuggeſtion or ſurmiſe at all.

SOME defects of this ſtatute were ſupplied by ſtat. 21 Hen. VIII. c. 20. by which the preſident of the council is added to the former three principal perſons. A doubt which aroſe upon this act, ſoon after the paſſing it[c], whether the biſhop, lord of the council, and juſtices, were only aſſiſtants, or had equal authority with the three great officers, was removed by this later act; which declares, that they were only there for their advice. Laſtly, the bill or information, which by the former act was to be exhibited to the chancellor, was by the latter to be put in generally; that is, to the king, as formerly.

THUS by the operation of theſe two ſtatutes, the above-mentioned eight offences, which before were moſtly cogniſable by indictment or action, might now be arraigned and tried without any inqueſt or jury, on the bare examination either of witneſſes or of the parties themſelves. This innovation was deviſed, ſays the ſtatute, becauſe the ordinary proceeding at common law was found unable to reach ſuch offenders. However, the puniſhment to be inflicted was ſuch as would have followed, had the proſecution been at common law.

THE alteration made as to theſe offences by this act, conſiſts principally in the circumſtances of proceſs, judges, and trial; the nature of the crime and its puniſhment remaining as it was before. If, therefore, the council departed from the meaſure of the penalty, or in any conſider-

[c] 8 Hen. VII. 13.

ation

CHAP. XXVII. HENRY VII.

ation of the crime varied from the judgment of the common law, it must be understood, that they then acted under the former authority which they originally possessed as the council of the king, and not by virtue of these statutes. For that authority still remained; and the council, in the understanding of the law, and in the execution and practice of their authority, sat and acted in both capacities, as appears by the books of entries during the reigns of Hen. VII. and Hen. VIII. which two princes did often sit there in person, under each jurisdiction [d].

It is to this mixture of judicial power that the star-chamber was indebted for the tremendous authority which it began to exercise soon after this time. While the statute of Hen. VII. gave vigour and efficacy to its proceedings, the immeasurable extent of its ancient judicature furnished an inexhaustible source of crimes and punishments, to be called forth on all occasions, and for every purpose. It became, on that account, the happiest instrument of arbitrary power that ever fell under the management of an absolute sovereign; as may be seen in the history of the princes of the house of Tudor, who owed the maintenance of their high prerogatives principally to the aid of this tribunal. The star-chamber exercised a criminal jurisdiction almost without limitation, and altogether without appeal; taking upon it to judge and animadvert upon every thing in which the government felt itself interested. It became, in truth, as much a court of state, if the expression may be allowed, as a court of law, by punishing all obnoxious persons, who, tho' they had been guilty of no breach of the law, had, nevertheless, some way or other offended the prince or his ministers. As the members of this tribunal were the confidential officers of the crown, there was no difficulty in those times of procuring a sentence against of-

[d] Lamb. Archeion, 168, 171, 172, 173.

fenders

fenders of that deſcription. The penalties inflicted by this court were ſo extravagantly ſevere, and the very deſign of its judicature ſo repugnant to the ſpirit of a free conſtitution, that it was always viewed with the greateſt abhorrence by the ſubject; and at length, when political liberty began to vindicate its claims with more boldneſs, was totally aboliſhed by parliament [e].

Informations at the aſſiſes and ſeſſions.

ANOTHER innovation upon the common law, and of a much more general nature than the former, was effected by ſtat. 11 Hen. VII. c. 3. The commencing of proſecutions by information had grown into common uſe in the reigns of Henry VI. and Edward IV. and were generally confined to penal ſtatutes, and likewiſe to the court of exchequer and king's bench. But the abovementioned ſtatute permitted juſtices of aſſiſe and of the peace, upon information, to hear and determine without a jury all offences (except treaſon, murder, or felony) committed againſt any ſtatute not repealed. This act was probably dictated by that prevailing inclination of Henry and his miniſters to enforce the obſervance of old penal ſtatutes, or rather to compel payment of ſuch penalties as were incurred by a breach of them. This ſcheme of filling his exchequer was unpopular, and therefore not fit to be truſted, in any part of it, to the verdict of common jurors. Whether this, or a general jealouſy of the trial by jury, was the reaſon of the law, it was a regulation not to be endured, and was repealed in the beginning of the next reign [f].

IT was by the colour of this act that Empſon and Dudley were enabled to effect ſuch infinite oppreſſions and exactions upon the people. For this purpoſe, too, a new office was erected, and thoſe two perſons were made *maſters of the king's forfeitures*. The reaſon of repealing this act is ſtated to be, "for that by force thereof it was known ma-

[e] By ſtat. 16 Car. I.

[f] By ſtat. 1 Hen. VIII. c. 6. c. 10.

ny

CHAP. XXVII. HENRY VII.

ny ſiniſter, crafty, feigned, and forged informations had been purſued againſt many of the king's ſubjects, to their great damage and vexation."

SUCH were the innovations made in the judicature of our criminal courts: we are now to notice what alterations were made in the courſe of proceeding and proſecution, which brings us back to the famous ſtat. 3 Hen. VII. c. 1. We have ſeen, in the laſt period, ſome parliamentary regulations regarding jurors, dictated by a ſuſpicion that they did not diſcharge their truſt with impartiality and truth [g]. Among Henry's ſchemes for a due execution of the law, one was to oblige inqueſts to be very ſtrict and regular in making their preſentments. In the clauſe of ſtat. 3 Hen. VII. c. 1. next after that for the inſtitution of the new form of the ſtar-chamber, it is ordained, that juſtices of the peace "may take by their diſcretions an inqueſt to enquire of the concealments of other inqueſts;" and every perſon of ſuch inqueſt was to be puniſhed for the concealment by the diſcretion of the juſtices. This was a refinement upon the proceeding by inqueſt in criminal matters, and was in the nature of an attaint in civil cauſes.

Appeal of murder.

AN appeal of homicide ſtill continued a common mode of proſecution, notwithſtanding the frequency of indictments; and the genius of the times ſo diſpoſed perſons to favour this vindictive action, that no indictment of murder uſed to be tried till the year and day after the fact (the period limited by law for commencing an appeal), leſt the offender, being acquitted or convicted on the indictment, might plead ſuch acquittal or conviction in bar of the appeal. After this ſpace of time had elapſed, it often happened, either by the death of witneſſes, or the zeal for juſtice ſubſiding, that proſecutions were entirely dropped, and the delinquent eſcaped unpuniſhed. Again, an appellor

[g] Vid. ant. vol. III. 280, 286.

muſt

muſt ſue in perſon: and the ſuit being long and expenſive, he frequently became tired of the proſecution; ſo that, with all theſe impediments, juſtice was not regularly enforced againſt this kind of offenders. To remedy this in future, the following regulations were made by this act. It was enacted, that if any principal or acceſſary in murder be indicted, he may be arraigned and tried at the king's ſuit at any time within the year, and not tarry the year and day for the appeal; and ſhould he be acquitted, the juſtices are not to diſcharge him, but either remand him to priſon, or let him to bail, till the year and day is paſt; within which time the perſon ſo acquitted, or even if he ſhould be attainted (and not have the benefit of his clergy), the perſon ſo attainted may yet be appealed by the wife or next heir before the ſheriff and coroners, or in the king's-bench, or at the gaol-delivery. To facilitate likewiſe the proſecution of ſuch appeal, it was allowed, that where battail did [h] not lie, the appellor might ſue by attorney.

THE power of trying an offender a ſecond time for the ſame offence is confined to caſes where the party had not had his clergy, becauſe a clerk ſo delivered to the ordinary was to be ſubjected to canonical puniſhment, and was no longer within the juriſdiction of the temporal judge. This proviſion, though reaſonable when firſt made, has occaſioned, by the alteration that has ſince taken place in the diſpoſal of clerks, a very ſingular diſtinction; for it now happens, that though a man acquitted of an indictment for murder may afterwards be appealed, yet a perſon who is found guilty of what is at preſent conſidered as a leſs offence, under the name of manſlaughter, is not liable to be appealed under this ſtatute, becauſe his clergy has been allowed.

THE other parts of this act either enforce the obſervance of certain common-law proceedings in caſe of murder,

[h] Vid. ant. vol. III. 419.

or

CHAP. XXVII.

HENRY VII.

or direct ſome new methods to be followed on the like occaſion.

It was declared, in the ſpirit of our old law [i], that ſhould any one be murdered in the day-time, and the murderer eſcape, the townſhip ſhould be amerced; and that as well the coroner ſhould enquire thereof upon view of the body, as juſtices of the peace, who were to certify it into the king's bench. Coroners were to deliver their inquiſitions before the juſtices of the next gaol-delivery within the county; and if the murderer was in gaol, they were to proceed to the trial of him, or put the ſaid inquiſitions to the king's bench. For this trouble the coroner was to have a fee of thirteen ſhillings and fourpence for the inquiſition, to be paid by the townſhip if the murderer had no goods: a penalty was inflicted for neglect of duty. As a part of the ſame ſcheme for preventing public diſorders, and for keeping the police under good government, it was directed, that juſtices of the peace ſhould certify at the next ſeſſions all recogniſances of the peace, that the party bound might be called; and if he did not appear, the recogniſance, with the record of default, was to be certified into the chancery, king's bench, or exchequer.

Bailing felons by juſtices of the peace.

The authority of juſtices of the peace was further ſtrengthened by c. 3. of the ſame ſtatute. By ſtat. 1 Rich. III [k]. *every* juſtice of the peace was permitted to bail perſons arreſted for light ſuſpicion of felony; but this authority, as it was given to every ſingle juſtice, had been abuſed, and many heinous offenders, not mainpernable by law, had been let out upon the country; ſo that this ſtatute, which was deſigned only to alleviate the condition of felons before trial, had contributed to obſtruct the execution of juſtice. To obviate this, that ſtatute was now repealed; and it was further ordained, generally,

[i] Vid. ant. vol. II. 22. [k] Vid. ant. 128.

that

that the juſtices of peace in every county, city, or town, *or two of them at leaſt*, ſhall have authority to let to bail perſons mainpernable by law, to the next general ſeſſions, or gaol-delivery; and one of them at leaſt was to certify the ſame to the ſeſſions or gaol-delivery, under the penalty of 10*l*. Sheriffs and keepers of gaols were to certify the names of their priſoners at the next gaol-delivery, to be kalendared before the juſtices of the deliverance of the gaol, under the penalty of 5*l*. In this manner was the article of bailing felons, and the delivery of gaols, begun to be put in the courſe it has continued in ever ſince. The ſure cuſtody of priſoners was provided for by a ſtatute, which declared all county gaols to be in the keeping of the ſheriff, and ordained ſeveral penalties upon him and his officers, if they ſuffered felons to eſcape [1].

In the next year a proviſion was made which it was thought would contribute to a due diſcharge of the important truſt repoſed in theſe magiſtrates. By ſtat. 4 Hen. VII. c. 12. a proclamation, therein ſet forth, is directed to be read at the ſeſſions four times a year. This exhorted perſons who had cauſe of complaint againſt any juſtice, to ſtate their grievance to any of his fellow-juſtices in the neighbourhood; and if he gave them no redreſs, then to the juſtices of aſſiſe; and ſhould they ſtill think themſelves not redreſſed properly, to the king or his chancellor.

Benefit of Clergy.

The benefit of clergy, that impolite exemption, began now to be modelled by the legiſlature almoſt into a new form, and applied to the purpoſe of penal reſtriction with reaſon and effect. It became a diſtinction between offences, and not between perſons; and being taken away from offenders in ſome crimes, or ſome circumſtances of crimes, and not in others, it ſerved to proportion the

[1] Stat. 19 Hen. VII. c. 10.

degree

CHAP. XXVII.

HENRY VII.

degree of puniſhment according to the true meaſure of diſtributive juſtice, the heinouſneſs of the offence.

THIS privilege being deſigned at firſt only for the actual clergy, was, it has been ſeen, by degrees extended to all who could read, and ſo were *capable of becoming clerks*. Though the ſtat. *de clero*, 25 Ed. III. by ſpecifying the orders of clerks that ſhould be intitled to this privilege, excluded actual laymen from claiming clergy; yet the former latitude ſoon prevailed again, and a capacity to read became once more ſynonymous with clergy [m]: it had alſo been the uſage to allow it to all ſuch felons in every ſingle offence. This deviation from the original idea, which permitted every one who could read to commit any felony with impunity, though an enormous abuſe, did not ſo ſhock the underſtandings of men bigotted to an eccleſiaſtical tyranny, as to excite at once an entire reform. The legiſlature proceeded gradually and with reverence for the ancient privilege they were about to invade; and attacking firſt thoſe who had leaſt claim to indulgence, they ſacrificed all lay offenders to the demands of juſtice. By ſtat. 4 Hen. VII. c. 13. laymen are allowed their clergy only once; and (probably to prevent their impoſing on the court at a ſecond trial, and praying their clergy again) it is ordained, that every perſon ſo convicted ſhall, if it is for murder, be marked with an M upon the brawn of the left thumb, and if for any other felony with a T; which marks are to be made by the gaoler in open court in preſence of the judge, before the party is delivered to the ordinary. Thoſe who are actual clerks, are, upon a ſecond trial, if they have not ready their letters of orders, nor a certificate thereof from the ordinary, to have a day appointed by the juſtices to bring them in; and if they fail at the day, they are to loſe the benefit of their clergy, like thoſe who are not in orders.

[m] Vid. ant. vol. III. 422.

THUS

THUS was the antient claim of clergy taken away from certain perſons, who were conſidered as not anſwering the deſcription of clerks properly intitled to that privilege. This was followed about three years after by another ſtatute, which related not to particular perſons, but to particular offenders, who were thereby deprived of this benefit. The ſtat. 7 Hen. VII. c. 1. having provided ſeveral penalties in caſes of deſertion from the army, enacts, that ſoldiers departing out of the king's ſervice without the licence of their captain, ſhall be deemed felons; and "foraſmuch (ſays the ſtatute) as this offence ſtretcheth "to the hurt and jeopardy of the king our ſovereign lord, "the nobles of the realm, and of all the common-weal "thereof," a perſon ſo offending ſhall not enjoy the benefit of his clergy. Such prevalent reaſons did the parliament think it neceſſary to ſtate for curtailing this privilege, which had been enjoyed by felons for ſeveral centuries.

SOME few years after, an accident happened, which brought the ſubject of clergy again under conſideration of the legiſlature. One *James Grame* had murdered his maſter, and a ſpecial act of parliament was made for the puniſhment of this heinous offence, which otherwiſe would have eſcaped under the exemption of clergy. It was therefore enacted by ſtat. 12 Hen. VII. c. 7. that this perſon ſhould be attainted of the murder, as a felon, in petit-treaſon; and ſhould be drawn and hanged, as perſons who are no clerks, notwithſtanding any privilege of clergy. It was alſo further ordained, that for the future, if any lay perſon prepenſedly murder his lord, maſter, or ſovereign immediate, he ſhall not be admitted to his clergy.

THUS far, and no farther, did the legiſlature venture to go, in taking away the privilege of clergy, during this reign. They confined themſelves to an inſtance where the ſafety of the kingdom was immediately intereſted, and

to

CHAP. XXVII.

HENRY VII.

to a crime which ſtood in the higheſt order of private offences, namely, petit-treaſon. When this way of heightening the ſeverity of our penal law was once pointed out, it will be ſeen in the next and ſucceeding reigns with what quick ſteps we have haſtened to encreaſe the number of thoſe caſes, in which the blood of our fellow-citizens may be ſhed by law. It will be proper in this place to obſerve, that we find in this reign a ſingular inſtance of the legiſlature interpoſing to give vigour and energy to the eccleſiaſtical court. By ſtat. 1 Hen. VII. c. 4. it is expreſsly declared to be lawful for biſhops and other ordinaries to puniſh prieſts, clerks, and religious men for incontinence; for which offence they may commit them to priſon at their diſcretion, and ſhall be liable to no action of falſe impriſonment for ſo doing.

THESE are all the alterations made in our law by ſtatute in this reign. From the deciſions of courts, we ſhall ſelect ſuch matter chiefly as relates to the new points that had lately been agitated there; to limitations of eſtates, to uſes, to actions of ejectment and upon the caſe, the proceedings in equity, to which we ſhall add ſome few points of criminal law. It is not for want of materials that our enquiry will be thus circumſcribed, but to avoid dwelling upon queſtions that have already engaged much of our attention, and that our Hiſtory may keep pace with the ſucceſſion of objects, and duly preſent them to view as they make their appearance, or undergo any change in their advancement. Allowing ourſelves to enlarge a little upon theſe topics, we ſhall be content to remark, in general, of the learning of this reign, that it is of a ſort with that of Henry VI. and Edward IV.; that queſtions are diſcuſſed with great preciſion, and much at large; that many points of doubt were ſettled; and that the Year-book of this king is as valuable, and perhaps, on the latter conſideration, more ſo than any other in the annals of our law.

WE

We have before ſeen the opinion of Littleton upon a perpetuity created by judge Richel, where his objections to ſuch kind of gifts are ſtated with great preciſion and earneſtneſs *. However, it ſeems to have been a prevailing opinion, that conditional reſtrictions, in ſome ſhape, might be impoſed on limitations in tail [n]. In 11 Hen. VII. a gift of land was made to a man in tail, with remainder to his right heirs in tail, upon condition, if the tenant in tail or his heirs aliened in fee, that the donor or his heirs might enter. This condition was held good by all the juſtices. However, it may be remarked, that this reſtriction ſo far differed from that againſt which Littleton argued, that in this the donor or his heirs were to take advantage of it by entry; there the benefit was to accrue to the next in limitation; whoſe entry, on account of forfeiture, was not analogous to the eſtabliſhed courſe and deſign of ſuch penal conditions, which were always reſerved to be taken advantage of by the maker: and Littleton himſelf, in another place, maintains ſuch condition to be good, when reſerved to the donor; and the reaſon he gives is, becauſe it was in aid and to ſupport the deſign of the ſtatute *de donis* [o]. It muſt at the ſame time be obſerved, that this reſolution was after recoveries had been allowed to bar eſtates tail; and a great partiality to entails muſt ſtill have ſubſiſted, for the judges to determine ſuch condition to be good, when the eſtate of the tenant in tail on which the condition was annexed might have been barred, with all claims and rights, whether by condition or otherwiſe. But by the opinion of the judges in this caſe, it ſhould ſeem, that a power to reſtrain the ſuffering a recovery was conſidered as reſiding in the donor; that being a ſpecies of alienation.

The learning of uſes in this reign ran into great nicety and refinement. Beſide the progreſs they would of Uſes,

* Vid. ant. vol. III. 324.

[n] 11 Hen. VII. 66.

[o] Sect. 364.

themſelves

CHAP. XXVII.

HENRY VII.

themſelves, as a ſubject of legal diſcuſſion, naturally make towards attaining a more artificial form, particularly as they were now connected with queſtions of entails, the ſtatute of Richard III. by giving a power to *ceſtui que uſe* concurrent with that of the feoffee to make common-law gifts and conveyances, gave riſe to perplexities of a new ſort.

THE following are inſtances of the ſort of argument which aroſe upon this ſtatute, and of the conſtruction it received in the courts. If *ceſtui que uſe* in tail made a feoffment in fee, this bound him and his feoffees during his life, by ſtat. 1 Rich. III. but after his death, his heir or the feoffees might enter, for it was only a grant of his own eſtate; the like of a tenant for life of a uſe; for his feoffment could not induce a forfeiture, a uſe not being ſuch property as could be forfeited [q]. It was held, that when *ceſtui que uſe* made a leaſe for life, the reverſion was in the feoffees who ſhould have the action of waſte, notwithſtanding there was no privity. It was held, that a reſervation of rent might be made on a grant under this ſtatute, though there is no mention of it in the ſtatute [r]; but it could not be made without deed. If *ceſtui que uſe* made a feoffment on condition, and entered for the condition broken, he might retain it abſolutely againſt his feoffees; for as the fee and right was intirely out of them by the feoffment, they could not by law enter upon him; though it was held in caſe of a man ſeiſed *in jure uxoris*, that he, upon his re-entry, ſhould be ſeiſed in the former right and not in his own [s].

CESTUI *que uſe* deſired in his will, that his executors might ſell his woods; and this was held to be warranted by ſtat. 1 Rich. III [t]. If a man deviſed his land to be ſold by his feoffees for payment of his debts, and the feoffees neglected to do it, the creditors might have a

[q] 4 Hen. VII. 18.
[r] 21 Hen. VII. 25.
[s] 5 Hen. VII. 5.
[t] 14 Hen. VII. 14.

ſubpœna.

ſubpœna. If the deviſe was general, it was agreed, that the executors, and not the feoffees, were the proper perſons to ſell [u]. Notwithſtanding this apparent liberality, yet ſo ſtrictly was *ceſtui que uſe* tied up to the words of the ſtat. 1 Rich. III. that all the juſtices held, he could not make livery by attorney, becauſe that power was not given by the act [x]. Again, it was holden by all the juſtices of the common pleas, that the *ceſtui que uſe* could not take beaſts damage feaſant in his own name, as he had nothing but the occupation at the ſufferance of the feoffees, who might have the action, and ſo the treſpaſſer would be puniſhed twice; but thoſe to whom *ceſtui que uſe* conveyed any intereſt under the ſtatute, might juſtify in their own names: the ſtatute therefore ſeems wholly made in favour of the alience [y].

In the ſeventh year of the king, it was agreed by the whole court, that execution of a ſtatute merchant or ſtaple, or a writ of *elegit*, might be had againſt the land of *ceſtui que uſe*; for tho' the word execution was not in the ſtatute, yet this ſort of execution was conſidered as within the equity of it, being in effect a ſort of *leaſe* [z]. Thus it appears, that ſtat. 19 Hen. VII. was ſo far only a declaration of the common law [a]. The power given to *ceſtui que uſe* by this ſtatute, was wholly unconnected with any intereſt; but this, ſuch as it was, together with the common-law power and intereſt of the feoffees, produced ſuch a complication of rights and titles, as muſt give riſe to many intricate queſtions of law.

As to conveyances to uſes, hitherto we have taken notice only of feoffments and fines to a uſe; but it appears in this reign that a new method had been practiſed, which, particularly ſince the ſtatute of Richard III. had entirely

[u] 15 Hen. VII. 11.
[x] 9 Hen. VII. 26.
[y] 15 Hen. VII. 2.
[z] 7 Hen. VII. 6.
[a] Vid. ant. 139.

CHAP. XXVII.

HENRY VII.

Bargain and ſale.

ſuperſeded the neceſſity of any common-law conveyance: this was *by bargain and ſale*. This was done two ways: either the *ceſtui que uſe* ſold to another the uſe, and the feoffee from that time ſtood ſeiſed to the uſe of the vendee; or, the bargainer being ſeiſed of the actual freehold, ſold the land to the vendee; in which caſe he ſtood ſeiſed to the uſe ſo ſold. This was tranſacted without even the formality of a deed, and was held good even in a court of common law, by virtue of the late ſtatute [b]. The validity and ſenſe of this conveyance depended upon the fairneſs of the contract. The vendee having paid the money, had done that which imported in itſelf a good conſideration; and as in the laſt of the two inſtances before ſtated, he could not have the land, there being no conveyance of it; and he had really contracted for the uſe in the former, which was the only thing reſiding in the *ceſtui que uſe*; it was reaſonable that he ſhould have a title to the profits; which might, even before the ſtatute of Richard III. be enforced in a court of equity.

THUS a bargain and ſale reſted upon the goodneſs of the conſideration. Indeed in all caſes, ſo eſſential was a conſideration to give being to a uſe, that it grew to be a maxim, that where a feoffment was made without conſideration, the uſe reſulted back to the feoffor, and the feoffee was ſeiſed only to the uſe of the feoffor. The reaſon of which was this: The determination on the validity of uſes being left with the chancellor, who judged according to conſcience and equity, he thought that when a feoffment was made, and it remained doubtful whether it was in *uſe*, or in *purchaſe*; conſidering that purchaſes were notorious, and would generally prove themſelves; and that uſes were ſecret, and needed ſtrong reaſons to ſupport their exiſtence; he, perhaps, thought it more expedient to put a purchaſer to prove his conſideration, than the feoffor and his heirs to

[b] 21 Hen. VII. 6. b.

prove

prove the truſt; by which means the intendment was always in favour of the feoffor's uſe, and the purchaſer muſt produce proof of ſome conſideration to ſhew that it paſſed to him [c].

HENCE it was that a conſideration became the great point upon which thoſe deeds of conveyance turned, that were afterwards invented in order to raiſe and to convey uſes.

Covenants to ſtand ſeiſed.

ONE of theſe was by way of *covenant*; which had been attempted in this reign for the firſt time, but without ſucceſs. The following was a caſe of that kind: It was covenanted by a man and his wife and *B.* that *B.* ſhould have the land to him and the heirs of his body; and upon default of ſuch iſſue, that the land ſhould remain to the huſband and his wife in fee. This was held to be void. Another inſtance, where this new conveyance was again tried, was, where it was covenanted that the lands and tenements of one ſhould *deſcend*, revert, or remain, to his ſon and heir apparent in conſideration of marriage, and to the heirs of him and his wife. It was adjudged that this covenant did not change the uſe, for two reaſons: one was, that it was a matter *in futuro*, and not executed; the other, becauſe it was put in the alternative, and therefore was uncertain whether to remain *or* revert. It was accordingly held, that the parties had no remedy but by action of covenant. When another covenant of marriage of the ſame nature was brought in queſtion, in 21 Hen. VII.[d] the ſame opinion was ſtill adhered to.

BUT altho' theſe deeds were rejected by the courts of law, which ſeemed determined not to allow that an uſe ſhould be raiſed by covenant, it cannot be doubted but ſuch conveyances met with favour in the court of chancery; which, conſidering the nature of an uſe as exiſting merely by contract and agreement, could hardly heſitate about decreeing the ſpecific performance of a deed ſo peculiarly

[c] Bacon's Tracts, 317. [d] 21 Hen. VII. 18, 19.

CHAP. XXVII.

HENRY VII.

adapted to the purpoſe for which it was formed. We are induced to think they really were ſupported in chancery, from the many precedents now extant[e] of ſuch covenants made in this reign: great eſtates were moſtly ſettled in this way; and in the next reign we ſhall ſee that theſe covenants were expreſsly adjudged legal by the courts of law.

THESE deeds were uſually made on the occaſion of marriage, in order to make a ſettlement of ſome part of the eſtate for the benefit of the widow and the iſſue. They were made ſometimes before, and ſometimes after, marriage; and were expreſſed to be made on that or ſome other conſideration. The diſpoſition thereby uſually made, was, an eſtate for life to the huſband and wife *jointly*, remainder to the iſſue of the marriage in tail, with remainders over. Theſe were again qualified with proviſos and conditions, upon which eſtates were to ceaſe or commence, and uſes were to ariſe or be revoked, in a ſtile and with a length unknown to the ſimplicity of the common law. Theſe novelties, however, were greatly multiplied by the fancies of conveyancers in the next and ſubſequent reigns.

THE joint eſtate for life to the huſband and wife was intended as a maintenance for the wife, if ſhe *ſurvived*, in lieu of her dower, of which ſhe was deprived where her huſband's eſtate was in uſe, and not in ſeiſin. This was now the caſe with much of the landed property of the kingdom; and therefore theſe *jointures*, as they were called, were become very common.

THE moſt important deciſion in this reign, was that which gave a new efficacy to ejectments, by adjudging a recovery of the term as well as damages; the conſequence of which was, that writs of aſſiſe of novel diſſeiſin, with writs of entry and of right, went out of uſe; and a title to land was, in the ſubſequent periods of our law, generally tried by ejectment.

[e] Vid. Mad. Form. Angl.

AN

CHAP. XXVII.

HENRY VII.

Ejectione firmæ.

An action *de ejectione firmæ*, or ejectment, we have ſeen was a remedy by which a leſſee being diſpoſſeſſed of his term in land, recovered damages againſt the wrong doer, for the treſpaſs in ejecting him. It had therefore a different object from the other remedies in ſuch caſes; one of which was a writ of covenant, the other a writ of *quare ejecit infra terminum*. The firſt lay only againſt the leſſor, and had long ceaſed to give the plaintiff any reſtitution, but merely damages for the ejectment: the ſecond lay only againſt the alienee of the ejector. The *ejectione firmæ* gave a remedy againſt the ejector, but it was only in damages; ſo that with all theſe forms of action, a termor for years might, notwithſtanding, be actually deprived of the poſſeſſion of his term, without reſtitution by the common law, if the land continued in the hands of the ejector. Leaſes for years had now grown to be of greater value, from the length to which it had become the practice to grant them: accordingly, the court of chancery began to take that cogniſance of them which the common law refuſed, but which they at preſent deſerved; and by a rule of redreſs, in which that court much delights, uſed to decree the ejector to make a ſpecific reſtitution of the land for the remainder of the term.

The courts of law ſeemed lately to incline towards adopting this method of doing ſubſtantial juſtice. In the reign of Edward IV. we have ſeen it was declared by Fairfax [f], that a plaintiff in ejectment ſhould recover poſſeſſion of his term, as he would in a *quare ejecit infra terminum*; and it was accordingly ſo adjudged ſolemnly in 14 Hen. VII [g]. A copy of the record of this caſe is ſtill to be ſeen in Raſtall [h], where the judgment is, *quod recuperet terminum ſuum prædictum*; a judgment not warranted by the original writ, which goes only to damages for the treſpaſs, without any hint at reſtitution. Soon af-

[f] Vid. ant. vol. III. 390.

[g] Jenk. Cent. pa. 67.

[h] 14 Hen. VII. 244. b.

ter

CHAP. XXVII.

HENRY VII.

ter this important resolution, ejectments were applied to recovering possession of land, and trying titles, as a remedy more simple, and less inconvenient and tedious, than the multifarious and complicated proceedings in the great variety of real actions.

That an ejectment in this manner might restore the possession where a *bonâ fide* termor in lawful and permanent possession was actually ejected, is obvious enough; but how the same proceeding could be applied to try titles, in all cases, it is not perhaps so easy to imagine.

It should seem that the first way of bringing ejectments to try titles was plain and regular, differing nothing or very little from what this action was, when brought to redress a real trespass, and to recover damages for it. Something was to be contrived in exact conformity with such original object. As a term was to be recovered, a term must first be created, and an ejectment from that term must be effected, upon which the action was to be grounded. It is probable, then, that a person claiming title used to enter on the land, and there seal a lease to *A.* This transaction might or might not be known to the tenant in possession. The construction of law upon this would be, that, of the two tenants, he was the trespassor who had no title to the possession; and he barely by being there, without any other act, committed, in law, an ejectment of the other; an ejectment, like a disseisin, being a wrong which a man might admit himself to have suffered, merely to take advantage of the remedy which the law in such circumstances would give him. *A.* the lessee, would, for the present purpose, suppose the title to possession to be in himself; and the two requisites for this action being obtained, he would serve a writ of trespass and ejectment against the tenant in possession, declare, and go on to trial. Then the plaintiff *A.* produced the title of his lessor, and the defendant the tenant produced that of his lessor; and so the right

was

was completely examined; for the title to make the leaſe being enquired into as a prefatory matter, they thereby collected who was the treſpaſſor; which was the direct point of diſcuſſion in this action.

THIS ſeems to have been the obvious, and was probably the firſt way in which a title to land was tried by ejectment. It was regular and ſimple, conſiſtent with the proceſs and proceeding in other actions; but the legal notion of treſpaſs and ejectment was of ſuch latitude, as to leave an opening for fraud and artifice to introduce ſome ſingular novelties into the proceeding by ejectment. If the tenant might be conſidered as a treſpaſſor by continuing in the poſſeſſion after the leaſe made to *A.* ſo might every one of his ſervants, and every ſtranger who *caſually* came on the land; and theſe, equally with him, might be made defendants, and put to ſhew by what authority they were there. The perſon claiming title would ſometimes take advantage of this, and get a friend to come on the premiſes juſt after *A.* had been put into poſſeſſion by ſealing the leaſe. This made him inſtantly, in law, a treſpaſſor and ejector. He was ſerved afterwards with a writ and declaration, upon which he would give the plaintiff judgment by default; and an *habere facias poſſeſſionem* iſſuing, the tenant in poſſeſſion was turned out, in order that the plaintiff might have full and clear poſſeſſion according to his judgment; the tenant being put to the neceſſity of bringing an ejectment, in his turn, to recover back the land.

A PRACTICE like this, ſo unfair and unjuſt, could not long ſubſiſt: the courts took it up, and, in order that the tenant might always be in a capacity to defend himſelf, made it a rule, that execution ſhould not iſſue, till the ejector, if a ſtranger, had given notice to the tenant that an action was commenced againſt him, ſubmitting to him whether he would defend it; upon which the tenant was allowed to defend it, in *his* place. However, notwithſtanding

CHAP. XXVII.

HENRY VII.

withſtanding this rule took away all the advantage gained by theſe clandeſtine ejectments, the practice of proceeding firſt againſt ſome ſtranger, called ſince a *caſual ejector*, was ſtill kept on foot; for the judgment obtained in this manner remained ſtill good in law, notwithſtanding the tenant was admitted to try his right: it put him under the neceſſity of defending the action, leſt he ſhould be turned out; and ſhould it be determined by a jury in favor of the plaintiff, execution would iſſue on that much ſooner than could be obtained by judgment on the verdict.

THUS did ejectments receive a new form, owing to circumſtances neceſſarily attending them, and to certain conſequences following from the legal properties of a treſpaſs. As there can be little doubt but an ejectment was conducted in the ſimple manner we have above ſuppoſed, when firſt made uſe of to this purpoſe; ſo there can be little doubt that it became, very ſoon after, the practice to make a caſual ejector, and to proceed as juſt related; the leſſee and caſual ejector being real perſons, as well as the entry and ejectment real facts. Such the practice continued till the end of queen Elizabeth's reign, and ſome years after, when the practicers got into the habit of ſhortening the proceſs very materially; and the judges endeavoured to expedite this uſeful action by ſome orders of court; ſo that, all together, it is now become a very ſingular and complicated proceeding.

THOUGH it had been adjudged that the term ſhould be recovered in ejectment, it cannot be ſuppoſed that damages were not, as formerly, recovered for the injury ſuſtained by loſing the intermediate profits; judgment therefore uſed to be as well for the meſne profits as the term. In after-times, when an ejectment came to be conſidered rather in the light of a real action, the plaintiff rarely prepared himſelf to prove the actual damages; upon the ejectment therefore he took only nominal damages, and

and afterwards brought a new action of treſpaſs for the meſne profits; of which action there is no mention till ſome time after the reign of queen Elizabeth.

As this action of ejectment, in the form of it, is for the treſpaſs, and not for the right; every freſh treſpaſs, which could be eaſily effected in the way above ſtated, is a freſh cauſe of action, and the right will every time be incidentally examined; very different from trying a right in ſome real action, where a judgment once given was either a final bar, or drove the party to a writ of a higher nature, very often more tedious in its proceſs. From hence it followed, that a title might be tried over and over again between the ſame parties, though they had each had verdicts againſt them. The gratification of trying a title more than once, together with the eaſe with which this action was conducted, contributed to make it a favourite both with our courts and with ſuitors. This innovation gave the laſt blow to real actions, which from the period when ejectments came into practice, went into diſuſe: a revolution that at once conſigned to oblivion at leaſt one-third of the ancient learning of the law.

WHETHER this was a change for the better, has been doubted by lawyers of ſome knowledge and experience. On the one hand it has been ſaid, that real writs were in their nature ſo ſpecial, and in their application ſo unaccommodating, that they were very unmanageable inſtruments in the hands of the practicer. Some were to be brought in a particular court; ſome lay only between particular perſons; others, for and againſt thoſe who had only particular eſtates; with various other circumſtances that were requiſite, antecedent to the bringing of the action: all theſe were at once ſupplied by an ejectment, which requires nothing but a preſent poſſeſſion in the defendant, and a right to it in the plaintiff. On the other hand, the preciſion of the proceeding in real actions, where the

CHAP. XXVII.

HENRY VII.

the matter in queſtion was thoroughly canvaſſed in pleading, and reduced to a ſimple point before it was truſted to a jury, is thought to be ill changed for the preſent courſe, where the whole queſtion is at once ſent in the groſs to trial upon the general iſſue, without any previous attempt to ſimplify or decide it with leſs circuity and expence. As to the length of proceſs, and other delays in real action, they, it is ſaid, might have been eaſily corrected by act of parliament.

THOUGH the practice had begun of applying ejectments to this purpoſe [i], there are no queſtions ariſing upon ſuch actions in the Year-book of this reign. Many titles to real property are there debated in treſpaſs and replevin. But the remedies by real action continued ſtill to be the practice of the time, though deſtined to give place to this new-modelled remedy in the next and ſucceeding reigns. With real actions fell a great part of the buſineſs of the common pleas; in them that court had poſſeſſed an excluſive right of judicature, which now begun to be imparted to other courts. Land, as a ſubject of action, was now in the ſame predicament as other matters of contract, and might be decided upon, in an ejectment, in any court in Weſtminſter-Hall. The king's bench, which from a criminal juriſdiction had long before poſſeſſed itſelf of perſonal actions, by help of fiction and intendment, received its ſhare of this acceſſion; and from thence derived an addition to its civil buſineſs, which was greatly increaſing from other cauſes. This was another conſideration that contributed to bring this action into vogue. The practicers in the court of king's bench and exchequer ſaw a medium by which they might partake in the valuable practice of the common-pleas, and of courſe would give every credit to ſuch a contrivance.

[i] Raſt Ent. 243, 244.

THE

THE opinions delivered in the reigns of Henry VI. and Edward IV. in favour of actions upon the caſe, for the non-performance of a promiſe, were confirmed by the train of deciſions in this reign. In 3 Hen. VII. an action was brought againſt a defendant, who, for a ſum of money, had undertaken to procure a leaſe for a perſon; but inſtead thereof, he obtained it for himſelf, in deceit of the plaintiff. When it was objected, upon the old notion, that nothing having been done, no action would lie; as there was no *miſ*-feaſance, but merely a *non*-feaſance; *Brian* demanded, whether if he promiſed, upon conſideration, to make a feoffment to one perſon, and afterwards made it to another, that would not be a great *miſ*-feaſance [k]? endeavouring in this manner to ſatisfy the ſcruples of ſuch as ſtill adhered to the ancient opinion; we are told that the court agreed with him. Conformably with this deciſion, it was declared in 21 Hen. VII. by the whole court, that an action upon the caſe would lie as well for a *non*-feaſance as for a *mal*-feaſance [l]; and this opinion was on another occaſion again recogniſed [m]; at which time it was ſaid, that if a man bargained that another ſhould have his land in fee for ſuch a ſum of money, and neglected making an eſtate accordingly, an action upon the caſe would lie without any need of ſuing a *ſubpœna* in chancery [n]. As the neceſſity of recurring to a court of equity to eſtabliſh ſuch agreements was not now ſo abſolute as before, there is no doubt but ſuits on ſuch queſtions fell back again into the old channel of the common law. The prodigious advantage of this common-law remedy, to ſubſtantiate promiſes and undertakings, was ſoon diſcerned by the legiſlature, which, on this account, as well as on account of the other applications that were made of this action, in this reign paſſed an act which gave to the action upon the caſe the ſame proceſs as was before in an action of debt.

Actions of *aſſumpſit*.

[k] 3 Hen. VII. 14.
[l] 21 Hen. VII. 30.
[m] 21 Hen. VII. 41.
[n] 21 Hen. VII. 41.

THERE

CHAP. XXVII.

HENRY VII.

THERE ſtill remained doubts in what particular caſes law-wager ſhould be allowed, and in what not. In the reign of Henry VI. [o]. it was doubted by *Newton*, *Paſton*, and *Aſton*, juſtices, whether in an action of debt brought againſt an abbot for things ſold to his predeceſſor, with an averment that they came to the uſe of his houſe, the defendant ſhould be permitted to wage his law. This point was again agitated in the beginning of this reign, when *Brian* held, that law-wager would not lie; ſaying, that a defendant could never wage his law, unleſs where of neceſſity and by common preſumption he muſt have notice of the cauſe of action [p]. In the latter part of this reign, the ſame queſtion came before the court, in the prior of Dunſtable's caſe, when it was held by all the juſtices, except *Brian*, that law-wager would lie [q]. It was there urged, that a man might wage his law, in many caſes, on the contract of another. Thus, a lord, if found, on account with his bailiff, to have received more than was due, in debt by the bailiff to recover ſuch ſurplus, might wage his law, though a ſtranger to the contract, which in fact commenced with the auditors; the ſame if the bailiff had been found before auditors to have been in arrear: ſo in debt brought on a recovery in a court baron. In like manner, in the caſe at bar, tho' the prior was a ſtranger to the contract, yet he was charged by it. It was ſaid, that this is not like the caſe of executors, who, it is true, are not allowed their law-wager; but that is not for want of privity, but becauſe they are not liable to an action on a contract of the teſtator. The action againſt executors is in the *detinet*. This is in the *debet*; for he is not a ſtranger to the contract, which was made in favour of the houſe, of which he was the head, but rather a principal party; and if this

[o] 21 Hen. VI. 23.

[p] 1 Hen. VII. 25.

[q] 21 Hen. VII 2.

debt

debt had arisen *tempore vacationis*, it was a settled point that the new prior might wage his law[r]. In an action founded on a statute, it was held, that a defendant should not wage his law[s]; though this point of law seems somewhat questioned in another case towards the close of this reign[t].

Chancery

THE chancellor continued in the exercise of that equitable jurisdiction, which had been gradually assumed by his predecessors. Besides questions upon uses, the grand subject of discussion in that court, we find the following points were there considered.

THE first case we shall mention is more remarkable for the manner of the judge, than the matter of the inquiry. Two persons were appointed executors, and one released a debt due to the testator, without the assent of his companion. It was suggested in a bill in chancery, brought by the other executor, that the will could not on that account be performed; and therefore a *subpœna* was prayed against the executor, and the person to whom he had made the release. It was there argued, that the plaintiff in equity was without remedy, for every executor has an entire power in himself; and as one could do that which his companion might, the release was good. "But," said the chancellor, "it is against reason, that one executor "should have all the goods, and give a release by himself: "I know very well that every law should be consistent "with the law of God, and that law forbids that an "executor should indulge any disposition he may have to "waste the goods of the testator; and if he does (says "the chancellor with some emphasis), and does not "make amends, if he is able, he shall be damned in "hell." But, upon the point of equity, he thought there should be a remedy; "for the words of the testa-

[r] 13 Hen. VII. 3.
[s] 10 Hen. VII. 18
[t] 21 Hen. VII. 14.

"ment

CHAP. XXVII. HENRY VII.

"ment are, *conſtituo tales eſſe executores meos, ut ipſi diſ-*
"*ponant, &c.* Their power is hereby joint, and not ſeveral;
"and therefore if one does an act without the other, he
"does it without a warrant. Again, it is *pro ſalute animæ*
"*meæ, &c.* and therefore if they diſpoſe it otherwiſe, they
"do what they have no authority for. At common law
"(ſays he), if a commiſſion of the peace iſſues, this gives
"no juriſdiction to try felons; and if a letter of attorney is
"given to make livery of one acre, a livery of two is with-
"out warrant, and void. Now, in this caſe, the teſta-
"ment is their warrant, and the laſt declaration of the
"teſtator's will; and ſhould they exceed that, there muſt
"be ſome remedy, as I conceive." Thus argued the chancellor; but the caſe ſtood over for further conſideration[x].

WHERE a cogniſee, in a ſtatute merchant, had extended the land, and the cogniſor ſold the land and ſuffered a recovery thereof, it was held, that as he could not falſify the recovery, there ſhould be a remedy by *ſubpœna* for the tenant. Again, where an obligation was paid without a releaſe, and where one was bound to *I. S.* to the uſe of *W. N.* and *I. S.* releaſed the debt, in both theſe caſes there was relief by *ſubpœna*[y]. Reſpecting the proceſs of the court, it was held, that the penal ſum in the *ſubpœna* was *in terrorem*; and if it was not obeyed, the chancellor might aſſeſs a fine upon the party. This aſſeſſment being a judgment, it was held a *ſcire facias* might iſſue upon it[z].

WE next proceed to ſome queſtions ariſing in our criminal law. Notwithſtanding this king's reign is marked by ſeveral ſtate-proſecutions, little is to be found in our books upon the law of treaſon: the caſe of *Humphrey Stafford* is the only one that is recorded. It was there re-

[x] 4 Hen. VII. 4. b.
[y] 7 Hen. VII. 11.
[z] 10 Hen. VII. 5. a.

ſolved,

ſolved, that privilege of ſanctuary could not be claimed in caſes of high-treaſon by preſcription, without an original charter before the time of memory, becauſe it ſo materially touched the king's prerogative; unlike a claim to have waifs, ſtrays, and wreck, which might be preſcribed for. In the ſame manner, where a perſon claimed the goods of felons, outlaws, and cogniſance of pleas, he was obliged to ſhew a royal charter, and allowance in eyre, after time of memory. On the ſame occaſion the judgment of high-treaſon was pronounced as follows: that he ſhould be carried back to the Tower of London, ſhould be put on a hurdle, and drawn thro' the middle of the city to Tyburn, and there hanged by the neck; before he was dead his heart ſhould be cut out, his head cut off, and his body divided into four parts, to be at the diſpoſal of the king, and *Deus miſereatur animæ ejus, &c*[a].

THE nature of principal and acceſſory in treaſon does not ſeem to have been thoroughly underſtood, as it was afterwards ſettled. A man had been attainted of treaſon in counterfeiting the coin; and another was indicted, *quòd ſciens &c. illum felonicè hoſpitavit, manutenuit, et comfortavit, &c.* and ſome doubt ariſing whether he could be felonioufly acceſſory to the treaſon, the point was adjourned for the opinion of the court. It was then argued by *Brian*, one of the juſtices, that he might; for counterfeiting the coin was felony at common law, which felony was not done away by the ſtatute making it treaſon; and the proclamation on the exigent gave notice, that an outlawry impended both for treaſon and felony. In truth, every treaſon implied in it a felony; and therefore, ſaid he, it was clear law, that ſhould any one be attainted of treaſon on ſtat. 8 Hen. VI c. 6.[b] for burning houſes, after ſending a threatening letter, a man might be indicted *quòd felonicè illum hoſpitavit, &c.* becauſe burning houſes was a felony

[a] 1 Hen. VII. 24. [b] Vid. ant. Vol. III. 285.

before.

CHAP. XXVII.

HENRY VII.

before. But *Huſſey*, the chief-juſtice, ſaid, that as this was now become treaſon, there could be no acceſſory *felonicé*; nor could there be ſuch a thing as acceſſory *proditoriè*; which ſeems to have been the better opinion [c].

THE diſtinction between lawful and unlawful acts, was always the governing conſideration in imputing guilt or innocence, when a death was occaſioned without the intention of the ſlayer. It was laid down by *Fineux*, chief-juſtice, that where two played together with ſword and buckler, or jouſted, and one killed the other, it ſhould be accounted felony; becauſe, though theſe diverſions were ſuffered by law, yet it was not lawful to uſe them but at the command of the king. It was clear law, that ſhould one man beat another, without any intention to kill him, and the man died, it was felony, on account of the firſt act being unlawful; which was a very different accident from that, where a man ſhooting at a bull, or throwing wood from a houſe, chanced to kill a man; this being homicide *per infortunium*, by our old law [d]. However, in the principal caſe, it ſeems that *Fineux* retracted the opinion abovementioned; and in the firſt year of the next reign laid it down to be felony to kill a man in jouſting, or other diverſion, notwithſtanding the king's command, for ſuch command was illegal [e]. It is obvious that the legal opinions on a queſtion like this muſt, in a great degree, be governed by political conſiderations, and the humour of the times.

WHEN it was thus poſitively laid down that the perſons ſo ſhooting, or throwing wood, were not guilty of felony, it ſeems reaſonable that thoſe paſſages ſhould not be conſtrued without ſome qualification, but ſhould be limited in the manner laid down by Bracton [f]; namely, if it was

[c] 3 Hen. VII. 10.
[d] 11 Hen. VII. 23. Vid. ant. vol. II. 10.
[e] Bro. Coron. 229.
[f] Vid. ant. vol. II. 10.

done

done in a place not publicly frequented, and the probability was that no danger could enſue: indeed it ſeems hardly otherwiſe to be a lawful act [g].

It was no unuſual courſe at this time, in caſes of death, where the proſecutor thought it would not turn out to be felony, to lay the indictment as for homicide *ſe defendendo*, or otherwiſe, as the real caſe might be. On an indictment of this kind, and an application in chancery for the uſual pardon under the ſtatute of Glouceſter [h], ſome ſerjeants were of opinion, that there was no need of a pardon, becauſe the juſtices ought, they ſaid, to diſcharge the party without an arraignment; and it was only on an indictment for felony, and after the jury had found the defendant guilty *ſe defendendo*, that the above application was requiſite. But the juſtices thought otherwiſe; namely, that the indictment ſhould be tried, and on a conviction, a pardon ſhould be had to ſave the forfeiture [i].

There had been always great tenderneſs towards infants who had ſubjected themſelves to the penalties of the law by the commiſſion of crimes. The rule, however, that *malitia ſupplet ætatem*, ſeemed to be founded on a ſenſible diſtinction, and was univerſally adhered to in after-times. A boy of nine years old had killed another of the ſame age, and confeſſed the fact; but it was alſo found, that when he had committed the murder, he hid the body, and made an excuſe for the blood upon him, as if it had followed from ſome accident to himſelf. This ſeemed to come within the conſtruction of the above rule, and the juſtices were of opinion he ſhould be hanged [k]. In another caſe, where two boys were keeping ſheep, and one, being between ten and twelve years old, killed the other, and hid the body among the corn, and confeſſed the whole fact, the execution was reſpited for the opinion of the

[g] 21 Hen. VII. 29.
[h] Ch. 9. Vid. ant. vol. II. 153.
[i] 4 Hen. VII. 2.
[k] 3 Hen. VII. 1.

CHAP. XXVII.

HENRY VII.

juſtices, greater part of whom thought he ſhould be hanged [m]. If a blow was given in one county, and the party died in another, an appeal might be brought in either, and the fact would be tried by a jury of both; but an indictment, in ſuch a caſe (notwithſtanding ſome *dictums* to the contrary [n]) would lie in neither county, as the jurors have authority only to inquire *pro corpore comitatûs*, and no more [o].

IT has not fallen in our way to ſay any thing on the crime of arſon ſince the reign of Edward I [p]. It was then ſaid to conſiſt in burning the corn or houſe of another feloniouſly. After that there is an intire ſilence in our books as to the nature of this felony. We find, in this reign, that a man was indicted for that he feloniouſly in the night had burnt a *barn*; and becauſe the barn was adjoining to a houſe, this was held a felony at common law, and the offender was hanged [q].

Larceny.

SOME queſtions of larceny, ſimilar to the famous one in the time of Edward IV. were again agitated in this reign [r]. It was propounded by *Huſſey*, who was then chief-juſtice, whether, if a ſhepherd took the ſheep, or a butler the plate, unde his care, it could be called felony; he himſelf thought it was, and related the caſe of a butler who was hanged under ſuch circumſtances: to which a ſimilar caſe was added by *Haugh*, of a goldſmith, who had taken ſome things that were entruſted to his charge. In anſwer to theſe, *Brian* argued that it could not be felony, becauſe neither of theſe perſons could be ſaid to take the things *vi et armis*, while he had them under his care: and of this opinion were the juſtices [s]. This was giving a blow to the determination in the time of Edward IV. and expreſsly contradicted ſome caſes that were there taken for ſettled law,

[m] 3 Hen. VII. 12.
[n] 7 Hen. VII. 8.
[o] 4 Hen. VIII. 18. 6 Hen. VII. 10.
[p] Vid. ant. vol. II. 274.
[q] 11 Hen. VII. 1.
[r] Vid. ant. vol. III. 410.
[s] 3 Hen. VII. 12.

ad

and argued upon as ſuch; eſpecially that of the butler. However, we find this caſe of the butler was underſtood otherwiſe ſome years after, and a diſtinction was taken between the poſſeſſion a butler has while in the maſter's houſe, and the poſſeſſion of a ſervant entruſted out of the houſe. It was propounded by ſerjeant *Pigot*, in the court of king's bench, to ſerjeant *Cutler*, in this way: If I bail a bag of ſilver to my ſervant to keep, and he goes away with it, can this be felony? *Cutler* ſaid yes; for as long as he is in my houſe, or with me, that which I have delivered to him is adjudged in my poſſeſſion: thus if my butler, who has my plate in his cuſtody, runs away with it, this is felony; the ſame if a perſon having the care of my horſe goes off with it; becauſe in both theſe caſes the thing remained all along in my poſſeſſion. But if I deliver a horſe to my ſervant to ride to market, and he rides away with it, this is no felony; becauſe he came by the lawful poſſeſſion of the horſe, by delivery out of my cuſtody. The ſame if I give him a bag to carry to London, or to pay away to ſome one, or to purchaſe ſomething; if he goes away with theſe it would not be felony, becauſe they were out of my poſſeſſion, and he had lawful poſſeſſion of them himſelf. To this *Pigot* aſſented, adding that he might, in all theſe caſes, have an action of detinue or accompt *; which idea of *poſſeſſion* is conſonant to one of the principles laid down in the caſe ſo often alluded to. Another caſe of *property* and *poſſeſſion* was alſo conformable with an opinion delivered in the foregoing period; namely, that a man who retook his own goods in order to charge the bailée, was guilty of felony †.

It was common, in an appeal of mayhem, for the defendant to pray an inſpection of the mayhem aſſigned, either by proper ſurgeons, or by the juſtices; and the opinion given by either was peremptory, and finally determined

* 21 Hen. VII. 14. † 5 Hen. VII. 18.

CHAP. XXVII.

HENRY VII.

the cauſe [u]. It ſeems to have reſted with the juſtices, whether they would grant ſuch inſpection or not; and if upon examination a doubt aroſe whether it was a mayhem or not, the juſtices might compel the party to refer it to the country [x]. Upon the occaſion of a felon being taken out of the officers' hands as he was leading to execution, it was ſubmitted to the court of king's bench, whether the reſcuing a felon was felony or not; and it was held, that ſuch reſcuers were principal felons, and not acceſſories; and it was ſaid to have been ſo determined in the reign of Edward IV. Such reſcue muſt appear not upon the return of the ſheriff, but by an indictment [y].

THE queſtion which had been ſo long agitated, how far the acceſſory ſhould be favoured by the clergy or other privilege of the principal, was brought forward again in this reign. In the exchequer-chamber, before all the juſtices, it was debated what ſhould be done where the principal and acceſſory were arraigned, and both found guilty, and the principal demanded a book before judgment given. *Huſſey* was of opinion, that the acceſſory ſhould have no advantage of this; for if a principal was outlawed, the acceſſory ſhould be put to anſwer, tho' the principal was not attainted of the felony, but only of the contempt: but it was held by all the juſtices and ſerjeants, that in this caſe the acceſſory ſhould be diſmiſſed. To this the reporter adds, that where the principal confeſſed the fact, and demanded a book, the acceſſory ſhould not be arraigned, becauſe no *judgment* was paſſed againſt the principal [z]. Notwithſtanding this, we find in the ſame year that the common courſe was to arraign the acceſſory, and if he was found guilty, he was hanged [a]. This point, therefore, ſtill remained to be ſettled. It was the opinion of the juſtices of both benches, that an acceſſory *before* the fact,

[u] 21 Hen. VII. 33. On a former occaſion it was thought not to be peremptory. 6 Hen. VII. 1.

[x] Ibid. 40.

[y] 1 Hen. VII. 6.

[z] 3 Hen. VII. 1.

[a] Ibid. 12.

tho'

tho' acquitted, yet loſt his goods, if he fled, the ſame as the principal felon; but not the acceſſory *after* the fact [b].

It had formerly been made a queſtion [c], how far an heir of the appellant might have execution againſt an appellee, when once convicted at the ſuit of the appellant. There was ſtill a difference of opinion upon this point; ſome conſidering it as an anceſtral action, of which the heir could not, conſiſtently with the analogy of legal reaſoning, be deprived; others again looking on it as a remedy for a perſonal injury, which *moritur cum perſonâ*. Upon a doubt, as in a former caſe, whether a *ſcire facias* on ſuch a record would lie againſt the heir for allowing a pardon, a deciſion on the principal point was avoided, by determining that the pardon might be allowed without it [d]. The contrary opinions that had been ſtarted at different times, on the admitting a defendant to become a provor, after pleading not guilty, were ſettled upon the following diſtinction: that on an indictment he might be admitted, after not guilty, and before verdict, but not on an appeal [e].

An alteration took place in the practice of dealing with priſoners who challenged the number of thirty-ſix jurors. It was the courſe in the reign of Edward IV. to put ſuch perſons to the penance. The ſame was done in the third year of this king by conſent of all the juſtices, except *Keble*, who ſaid, this being an appeal, was not a caſe within the ſtatute of Weſtminſter [f], which only ſpeaks of the king's ſuit [g]. In the ſame year it was agreed by the juſtices of both benches, without any diſtinction between an appeal and indictment, that a man who challenged thirty-ſix jurors ſhould be hanged, and not put to the penance; and it was reſolved that this ſhould be obſerved as the practice in their circuits [h], notwithſtanding the contrary uſage in former reigns. It was at the ſame time agreed, that thoſe who

[b] 4 Hen. VII. 18. 110.
[c] Vid. ant. vol. III. 414.
[d] 9 Hen. VII. 5.
[e] 11 Hen. VII. 5.
[f] Vid. ant. vol. II. 134.
[g] 3 Hen. VII. 2.
[h] Ibid. 12.

confeſſed

CHAP. XXVII.

HENRY VII.

confeſſed a felony, or were outlawed or abjured, or became provors, ſhould not make their purgation before the ordinary.

Sanctuary.

We have before ſeen what the courts decided reſpecting ſanctuary in caſes of treaſon [i]. If an offender fled to ſanctuary, it was not enough to declare that he came there to ſave his life, but to add that he had committed felony; tho' it was not requiſite that he ſhould name the ſpecial nature of the felony till the coroner came [k]. If he did not make ſuch a general declaration, he might, without ceremony, be dragged from thence [l]. If he confeſſed the felony, he would be permitted to remain there forty days, according to the old law. But what is ſaid above ſeems to be confined to a man taking ſanctuary in a *church*: for there were two manner of ſanctuaries; private, as *Weſtminſter Knoll*, and the like; and general ſanctuaries, as every church. If a man fled to ſuch a ſanctuary as the *Weſtminſter Knoll*, he might remain undiſturbed for life; but if he choſe to abjure within the forty days, the coroner was to appoint him a day to do it. The law of ſanctuary is laid down in a *reading* of this period in the following manner: None ſhall take ſanctuary but *in periculo vitæ*, as for treaſon, felony, or the like, and not for debt; for a grant or preſcription to have ſanctuary for debt, was againſt law, and void. But the reading lays down a ſtrange quibble to evade this; for it admits, that if a man's body was in execution, and he eſcaped, and came to a ſanctuary ordained as a refuge and ſafeguard for a man's life, he ſhould have benefit thereof, *becauſe by long impriſonment his life might be in jeopardy.* If a church was ſuſpended for bloodſhed, he who took it as a ſanctuary for felony, ſhould ſtill enjoy it for forty days. It was held that abjuration for felony diſcharged all felonies done before the abjuration. A man could not abjure for petty larceny, but only for ſuch felonies as induced the pain of death [m].

[i] Vid. ant. 174, 175.
[k] 3 Hen. VII. 1u.
[l] Bro. Sanct. 11.
[m] New Caſes, 79.

It

It was the opinion of the judges, that if the ordinary would not permit a clerk to make his purgation, the king might command it by writ[n].

King and government.

HENRY is celebrated by his hiſtorian[o] for the many excellent laws he cauſed to be made. He was not leſs attentive to the regular execution of his laws when made. In the firſt year of his reign, at the cloſe of the parliament, he deviſed an oath, binding all perſons who took it to obſerve the execution of ſeveral ſtatutes. We are told, that not only thoſe of the houſhold, but thoſe of the houſe of commons, came before the king and lords, and took this oath. After theſe, the peers, both ſpiritual and temporal, were aſked by the chancellor, whether they were willing to take the oath; who all anſwering that they were ready, it was read to them; and every lord ſpiritual laying his right hand on his breaſt, and every temporal lord on the book of goſpels, ſwore to obſerve and perform the ſame. The ſubſtance of the oath was, not to harbour felons; not to retain any one by indenture or oath, contrary to the ſtatutes of liveries; not to encourage maintenance, nor embracery, nor riots, nor unlawful aſſemblies; not to prevent the execution of the king's writs; nor let to bail or mainprize any felons[p].

A PRECAUTION like this at once ſhews the king's ſolicitude for the due execution of juſtice, and the protection it needed in times when great men, inſtead of promoting, had been more uſed to defeat the effects of it by force and cabal.

IT is ſaid, that Henry being entertained at the earl of Oxford's with great ſtate, at his departure expreſſed aſtoniſhment at the number of ſervants in liveries and badges he ſaw waiting; but being informed by his hoſt that they were his retainers come to do him honour, he told

[n] 15 Hen. VII. 9. [o] Lord Bacon. [p] Parl. Hiſt. vol. II. 419.

him

CHAP. XXVII.

HENRY VII.

him he would not have his laws broke before his face, and that his attorney muſt ſpeak with him. It is ſaid the earl paid 15,000 marks as a compoſition for this offence. In every tranſaction of this king there is a regard ſhewn by him to the laws. Tho' no prince was more jealous of his prerogative, or took greater pains to gratify his love of money, than Henry; yet in all inſtances where theſe two grand intereſts were concerned, he ſtill proceeded under the ſanction of law.

In the ſeventh year of his reign he revived *benevolences*, invented firſt by Edward IV.; but, more wary than that prince, he did it by conſent of parliament, and raiſed great ſums in that way. He ſtrictly enforced all penal ſtatutes which would contribute any thing towards his exchequer: with the ſame view he cauſed proſecutions to be inſtituted on many old and forgotten laws. Theſe legal oppreſſions, if they may be ſo called, were carried to a great height in the latter part of his reign, which rendered him extremely unpopular, if not odious; and ſubjected his two agents in thoſe proſecutions, Empſon and Dudley, to a ſevere account in the ſubſequent reign.

The new-modelling of the ſtar-chamber fell in with Henry's whole plan. It at once ſerved to ſecure his prerogative, by enforcing among all ranks of people a ſtrict obedience to the laws; and became a ſource from whence he was always deriving pecuniary ſupplies. The penalties in that court uſed to run very high. It is related, that Sir William Capel, an alderman of London, was fined in 2743l. an immenſe ſum in thoſe days! and he was obliged to compound for 1615l. This is mentioned only as one inſtance of theſe proceedings. Where criminal proſecutions did not produce fines, the king uſed to make them turn to account, by remitting corporal pains for pecuniary compenſations to be paid to himſelf.

Notwithstanding the bad uſe ſometimes made of ſevere laws, it cannot be denied that the temper and deſigns of

of Henry contributed to eſtabliſh the laws in their full force, and to render the adminiſtration of juſtice more regular and effectual. While this had a good influence on the order and peace of ſociety, it levelled all ranks of men under the ſame ſubmiſſion to lawful authority. The executive magiſtrate, in the perſon of Henry, increaſed in power and diſtinction; while the nobility ſunk below the relative importance they had formerly enjoyed; and the commons continued ſtill in their original imbecillity: ſo that the prerogative of the crown had in this reign an opportunity of aggrandizing itſelf to a degree much exceeding what it had been in earlier times, though not equal to what it became in the ſucceeding princes of the line of Tudor.

THERE are no ſtate trials of this reign now extant; and of theſe occurrences the chroniclers of the time give very unſatisfactory accounts. It is very uncertain what was the charge againſt Sir William Stanley, who was executed for a conſpiracy, as it is related, againſt the king.

THE method introduced by Richard III. of attainting perſons by bill, was purſued by Henry VII. and became henceforward not unfrequently reſorted to, where it was thought the common law could not effectually reach an offender.

THE legal monuments of this reign are the ſtatutes, judicial records, and reports. The ſtatutes underwent no further alteration in the manner of forming them in parliament. The records are from this period, almoſt in a regular ſeries, kept with order, and in good preſervation; as may be ſeen in the repoſitories of the courts of king's bench and common-pleas, in Weſtminſter-Hall. The reports are the *Year-book*, with ſome caſes in the collectors *Jenkins* and *Benloe*; but more particularly in *Keilway*, who lived at this time, and took them himſelf. The Year-book of this reign, as it goes more into points of law, and ſuch matters of learning as have ſurvived the times when

CHAP. XXVII.

HENRY VII.

when they were debated, is more deſerving attention than the preceding. We find the counſel and judges ſometimes quoting caſes; and Bracton is once or twice referred to [q]; but this was not common: their determinations were moſtly the reſult of argument and diſcuſſion, and theſe were made precedents for future ages.

THERE are no law treatiſes of this reign in print. But there is a famous book, ſaid to be ſtill in manuſcript, written by *Marrow*, on the office of a juſtice of peace; a work which has been quoted by later writers, ſuch as Fitzherbert and Lambard, with great commendation, and ſeems to have been followed by them on the ſame ſubject. Tho' this reign was ſo barren in original works, they were not backward in putting to the preſs the productions of former times.

THE art of printing began to give further aſſiſtance to the ſtudy of the law, than it had in the former period. Caxton went off the ſtage in 1491: we hear no more of Lettou and Machlinia. Wynkyn de Worde took the lead till 1497; when Richard Pynſon entered into competition with him, as did Julian Notary in 1498, Willam Faques in 1504, and afterwards Henry Pepwell; though the career of the laſt three did not extend much beyond the preſent reign, as did that of Pynſon and de Worde. Faques, and afterwards Pynſon, had attained a diſtinction which Wynkyn de Worde ſeems never to have enjoyed; they were ſucceſſively (and as ſome think jointly) king's printers. But this appointment ſeems to have conferred no excluſive right of printing law-books, for the ſtatutes continued to be printed by Wynkyn de Worde, and other printers: this appointment is thought not to have been by patent, but by ſign-manual.

THE ſeveral ſtatutes paſſed in this reign were printed ſoon after they came out by de Worde, by Pynſon, and by Faques; and ſome were repeatedly reprinted by all of

[q] 1 Hen. VII. 6. b.

them.

them. We have before intimated, that ſome ſtatutes aſcribed to Caxton moſt probably belonged to a later period, and may perhaps have been printed in this reign. There appears a collection of the ſtatutes, under the title of *Nova Statuta*, beginning with 1 Ed. III. and ending with 12 Hen. VII. This is printed by Pynſon, and is aſcribed to the year 1497, juſt after the cloſe of that parliament: it is however certain, that it was printed before 19 Hen. VII. as it would otherwiſe have contained the ſtatutes of that ſeſſion [r].

It is remarkable, that the lateſt and moſt accurate inquirers into our typographical antiquities do not preciſely fix the printing of any Year-book to the reign of this king. We have before taken upon us to ſay, that certain years of Henry VI. were printed about the years 1480 and 1483. A writer * of ſome learning, but famous for miſrepreſentation, has advanced, that Wynkyn de Worde was the firſt who began to print the Year-books; and that he and Pynſon printed above forty of them, which were to be found among the *libri manuſcripti* in Lincoln's-inn library; but upon ſearch, none ſuch have been found. Mr. Ames, a more faithful inquirer, informs us, that he never met with any Year-book bearing the name of Wynkyn de Worde, either alone or in conjunction with Pynſon; but that he had ſeen two, being 17 and 18 Ed. III. without a printer's name or date, which he thought were printed with the ſame type as Fitzherbert's Abridgment, in 1516; and which he makes no queſtion were printed by de Worde in the ſubſequent reign. It is agreed that Pynſon printed many Year-books; but it is ſtill left to the probability of the thing, whether he, any more than de Worde, printed any during this reign [s]. It ſeems moſt probable, that twenty-four years would not be ſuffered to paſs without ſome

[r] Typog. Antiq. 141. 144. 204. 205. 218. 283.

* Pſalmanazar.

[s] Typog. Antiq. 235.

addi-

CHAP. XXVII. HENRY VII.

addition being made to the ſtock of Year-books, which we have before ſeen were printed in the time of Edward IV. or Richard III. In general, the time of printing the Year-books ſeems to be leſs aſcertained than that of moſt other of our early-printed books, owing to their being moſtly printed without a date.

WHATEVER doubt there may be about the time of printing our books of common law, there ſeems none about thoſe of the eccleſiaſtical law. The edition of Lyndwood's Provinciale, before-mentioned [t], is aſcribed to Wynkyn de Worde, and is thought to have been printed in 1496. The great demand for this authentic canoniſt requiring a further ſupply, the ſame printer gave another edition in 1499, in octavo; and we find two others in 1505 [u]; one of them at Paris, ſuppoſed to be printed from an impreſſion made at Oxford.

Miſcellaneous facts.

WE find another increaſe in the judges ſalaries. Sir William Huſſey, appointed chief-juſtice of the court of king's bench in the 1 Hen. VII. had the yearly fee of one hundred and forty marks granted to him for his better ſupport: further, he had one hundred and ſix ſhillings and eleven-pence farthing and the ſixth part of a halfpenny (ſuch is the accuracy of our author and the ſtrangeneſs of the ſum) for his winter robes, and ſixty-ſix ſhillings and ſixpence for his robe at Whitſuntide *.

AN act of the Iriſh parliament made in this reign, as it communicated to that kingdom a participation of our laws in a more full manner than it before enjoyed them, may be conſidered as an intereſting fact in the Hiſtory of the Engliſh Law. Amongſt other ſtatutes made under the government of ſir Edward Poynings in 10 Hen. VII. and therefore called Poynings' Laws, there is one which enacts [x], that all acts of parliament made in England be-

[t] Vid. ant. 119.
[u] Typog. Antiq. 125. 135 312.
* Dudg. Orig. 110.
[x] Chap. 22. Iriſh Statutes.

fore

fore that period ſhall be in force within the realm of Ireland. The extending of the dominion of the Engliſh law by an act of that legiſlature, contributed to connect theſe two kingdoms in the ſtricteſt bonds of union; that of ſimilar laws, and a ſimilar conſtitution; the grounds and great outlines of which it was thought would ever be preſerved alike in both by the appeal which had long been made from the courts of that country to the courts here, notwithſtanding the differences that muſt by degrees ariſe from the regulations of a diſtinct parliament providing for the exigencies of a diſtinct people.

THERE was another proviſion of the Iriſh parliament, which ſeemed to promiſe, that the law of that country would not be permitted to deviate from the model communicated by the parent-ſtate. An act had been made by chap. 4. of the ſame ſtatute to the following effect: That before a parliament be ſummoned or holden, the chief governor of Ireland ſhould certify to the king, under the great ſeal of Ireland, the conſiderations and cauſes thereof, and the articles of the acts to be propoſed therein: That after the king in his Engliſh council ſhould have conſidered, approved, and altered the ſaid acts, and certified them back under the great ſeal of England, and given licence to ſummon and hold a parliament, then the ſame might be ſummoned and held; and therein the acts ſo certified, and no other, ſhould be propoſed and received, or rejected. This mode underwent further alteration in after-times.

CHAP.

CHAP. XXVIII.

HENRY VIII.

1509—1540

Of Judicature in Wales—and in Counties Palatine—Of Parliament—Of the Eccleſiaſtical Polity—Fees of Ordinaries—Reſidence and Pluralities—Submiſſion of the Clergy—Papal Authority aboliſhed—Marriage—Tythes—Of Precedents—The Poor Laws—Of Trade—Terms for Years—Leaſes of Tenant in Tail—Gifts to ſuperſtitious Uſes—Deviſe of Land—Statute of Uſes—Jointures—Statute of Wills—Statute of Bankrupts—Court of Wards and Liveries erected—Statute of Jeofail—Statute of Limitations—Trinity Term altered.

CHAP. XXVIII. HENRY VIII.

THE modifications made in our law during the reign of Henry VIII. attract our attention in a particular manner. The ſpirit of reformation which began to prevail at this time, was not confined to our religious worſhip; it ſpread to the eccleſiaſtical judicature, it reached the law of property, and the adminiſtration of civil and criminal juſtice. In every regulation of a juridical nature made in this reign, we perceive a deciſive hand. The parliament ſeemed determined at once to reſolve all doubts, and to root out all difficulties, which on former occaſions they had been content to ſoften and palliate according to the exigency of the preſent moment. Inſtead of continuing ſtill to aſcertain the boundary between the civil and ſpiritual judicature by new deſcriptions, proviſion was made by ſtatute for correcting ſeveral irregularities wholly of a clerical nature, and for an intire reform

reform of the eccleſiaſtical law: inſtead of endeavouring to repreſs the luxuriancy of uſes, by freſh ſtatutes againſt the pernors of profits, it was intended to deſtroy the thing itſelf. The grand object of barring entails, which was accompliſhed at laſt by a recovery, was now ſubſtantiated by a parliamentary proviſion in favour of that mode of conveyance; and the conſtruction which had been entertained with difference of opinion reſpecting the like effect of the ſtatute of fines in the laſt reign, was now expreſsly eſtabliſhed by the ſame authority. The deviſe of lands, which hitherto had been practiſed under the cover of a uſe, and had been partially allowed by a late act, was now, by expreſs ſtatute, indulged to every one. The benefit of clergy, which had ſo long ſtood in the way of our criminal judicature, was now aboliſhed in the principal and moſt common felonies. All theſe were innovations upon the ancient law, which gave it a new turn, and brought theſe points under conſideration in a variety of new appearances. To theſe may be added, the protection and eſtabliſhment of leaſes for years, execution againſt the effects of bankrupts, the limitation of actions, the locality of trial in felonies.

Such were the principal regulations of this reign, which had a laſting influence upon our juriſprudence, and ſtand, even at this diſtance of time, among the foremoſt objects of legal diſcuſſion. Others are of leſs importance, becauſe of ſhorter duration: ſuch were the poor laws; many of the new courts erected by this king; new treaſons and new offences of various kinds, with new-fangled tribunals for their examination; all which were repealed or ſuperſeded by ſtatutes in the next or following reigns. Upon viewing the regulations of this active period, whether of the former or latter kind, it appears, that ſuch important changes had not been effected within the ſame ſpace of time, ſince the days of Edward I.

The

CHAP. XXVIII.

HENRY VIII.

THE ſtatutes which contain the multitude of objects above alluded to, muſt neceſſarily fill a conſiderable ſpace, and would unavoidably require a great portion of the ſubſequent Hiſtory. But a ſtile of compoſition in framing ſtatutes began now to obtain, which ſwelled their ſize beyond all example of former times. This conſiſted partly in the matter and ſubſtance of them, and partly in the manner and form. Every parliamentary regulation was accompanied by a minute detail of particulars, and an accumulation of proviſos, exceptions, and qualifications: theſe were conveyed in a diffuſe and redundant language, crouded with ſynonimous terms and tedious repetitions. A regulation which in the reign of Edward I. would have been comprized in a few lines, was now ſpun out into as many clauſes: ſo that the ſtatutes of this ſingle reign actually cover as much paper as all thoſe preceding it, up to *Magna Charta*. The ſame faſhion prevailing, thoſe of the two ſubſequent reigns increaſed in the like proportion [z].

WITH this proſpect before us, it becomes neceſſary to adopt ſome rule by which we may abridge and ſimplify our materials, without doing any injury to the ſubject of our Hiſtory. Many of theſe ſtatutes are directed to concerns not at all of a juridical kind, and may therefore, as it ſhould ſeem, be paſſed over in ſilence. Thoſe that were of ſhort duration, either becauſe they were ſoon repealed, or were at firſt but temporary, may be treated more or leſs at large, according as they ſeem to deſerve a place in our hiſtorical inveſtigation: the remainder are ſuch as had an extenſive and permanent effect, and therefore are intitled to be detailed with all the minuteneſs which the compaſs of this work will allow. But even theſe, for the reaſons abovementioned, muſt ſometimes, and may in general with great propriety, be ſomewhat curtailed. It will very

[z] In the edition of the ſtatutes that uſually goes under the name of Raſtall,—the reign of Henry VII. ends at pa. 390; that of Henry VIII. at pa. 902; and that of Philip and Mary at pa. 1200.

often

often ſuffice for the purpoſe of this inquiry, to ſtate the ſubſtance and effect of a ſtatute, without following the identical words, or enumerating every proviſion it contains. By means of ſuch abbreviation, the legiſlative acts of this reign may be contracted into a narrative of moderate length, neither impeded nor embarraſſed with the irkſome formality of the materials from which it is collected. While the hiſtorian amuſes himſelf with the one, the other will be left for the more authentic information of the practicer.

UNDER the controul of the above method we ſhall now take a view of the ſtatutes of this king, in the following order. Thoſe claim our firſt notice which tend to give ſtrength to the political ſyſtem, and vigour to the ſovereign power; ſuch are thoſe for regulating the legal polity of Wales, and abrogating all franchiſes exerciſed independent of the crown. Next to theſe ſhould follow ſuch ſtatutes as affected the parliament. The next are ſuch as produced the abolition of papal uſurpations, and wrought a reformation in our eccleſiaſtical conſtitution: then the laws that concerned the civil ſtate: after theſe will naturally follow the laws relating to private property, and the adminiſtration of juſtice; and, laſtly, thoſe relating to our criminal law. This is the order in which we intend to ſpeak of parliamentary proviſions during this reign.

Of judicature in Wales.

OF the firſt kind are the ſtatutes concerning Wales. At the time when the parliament came to the reſolution of introducing a more complete ſyſtem of laws and adminiſtration of juſtice into Wales, the judicial eſtabliſhment there ſeems to have been of the following kind: From the time of Edward I. the Engliſh law had prevailed to a certain degree, and had at length in general obtained the aſcendant, in the government of property and the puniſhment of offenders; but this was always mixed with their local cuſtoms: to theſe they adhered with great predilection; and they were encouraged in this partiality by the number of petty juriſdictions into which the country was

CHAP. XXVIII.

HENRY VIII.

divided. The adminiſtration of juſtice in a great part of Wales was in the hands of the lords marchers, each of whom exerciſed a kind of feudal ſovereignty within his diſtrict, and became accordingly, in the perſon of his ſteward, the judge, with a full enjoyment of all the caſualties of judicature; ſuch as fees, fines, amercements, and forfeitures. Theſe caſualties, probably, the lords poſſeſſed in a greater or leſs extent, according to the nature of their franchiſe; ſome being the king's lord marchers; others being lords marchers, in a manner, independent [a].

BESIDES the variety of laws and uſages, that muſt follow from ſo many diſtinct tribunals; they were likewiſe productive of diſorders in the police, from defects of juſtice, owing to neglect, colluſion, or the claſhing of different juriſdictions. It was to remedy this, and to ſtrengthen the royal authority over the principality, that *a preſident and council* had been lately appointed under a commiſſion from the king. Theſe conſtituted a court, and ſeem to have maintained a kind of pre-eminence and ſuperintendant authority over the other judicatures of the country; but the whole of their power and authority does not exactly appear. Another ſupport of the king's ſovereignty conſiſted in the juſtices by him appointed. There was, and had been in very early times, a juſtice of *Cheſter* [b], whoſe juriſdiction comprehended the county of *Flint*; there was alſo the king's juſtice of *North Wales*, whoſe juriſdiction included *Angleſey*, *Carnarvon*, and *Merioneth*; and the juſtice of *South Wales*, which included *Carmarthen*, *Pembroke*, *Cardigan*, and *Glamorgan* [c]; the remainder of Wales being then not divided into counties, but under the government of the lords marchers, as before mentioned. Where juſtice was adminiſtered by judges appointed from the king, it cannot be doubted

[a] Vid. ant. vol. II. 94, 95. and ſtat. 26 Hen. VIII. c. 6. ſect 1.

[b] Vid. ant. vol. II. 96.

[c] Stat. 27 Hen. VIII. c. 5.

but

but the Engliſh law was pretty generally known and obſerved. The judicial arangement in North Wales ſeems to have been tolerably well adjuſted; for in the courſe of the ſettlement now about to be made, That is always referred to as the model by which this inſtitution was to be framed, and the guide by which many of its operations were to be governed. Such was the ſtate of the legal polity in Wales in the 26th year of this king, when the firſt ſtatute was made for reforming it.

The ſtatute of 26 Hen. VIII. c. 4. was made to prevent the friends and kindred of criminals from labouring, and ſuborning jurors. It is thereby directed, that the officer of the court for the due keeping of the jury ſhould not ſuffer them to eat or drink, or any one to ſpeak to them. There is a very remarkable clauſe in this act, which ordains, that if the jurors acquitted a felon, *contrary to good and pregnant evidence*, or otherwiſe miſbehaved themſelves, the judge might compel them, upon pain of impriſonment, to be bound by recogniſance to appear before the preſident and council, and abide the deciſion of that tribunal on their conduct. The preſident and council might impriſon or fine them at their diſcretion; an authority which had been exerciſed by judges in England [d] without the ſanction of an act of parliament, but not without great murmuring; and it was not till long after this that a ſolemn determination was pronounced againſt the legality of ſuch procedure [e].

This is followed by an act, in the ſame ſeſſions [f], containing proviſions very ſimilar to thoſe made in the earlier times of our hiſtory; which ſhews the influence of laws at that time in Wales to have been much what they were in England in the reigns of Henry III. and the beginning of Edward I. After complaining of the great

[d] Vid. ant. vol. III. 105.
[e] In Charles II's reign.
[f] Chap. 6.

CHAP. XXVIII.

HENRY VIII.

diſorders prevailing in the principality, owing to the diſobedience of the law, it directs all perſons, upon monition given, to be attendant at the courts of juſtice, under certain penalties and forfeitures; none were to appear within two miles of the ſeſſion or court with any kind of weapon or armour, upon pain of impriſonment and fine; and all courts were to be kept in the *moſt ſure and peaceable place* that could be choſen [g]. To give redreſs againſt the oppreſſions of lords marchers, they and their ſtewards or officers were made liable to be fined by the preſident and council, for unjuſt impriſonment of any one within their diſtrict. To be ſure of the execution of the law againſt the worſt offenders, it was enacted, that coining, murder, and other felonies, ſhould be tried in the next Engliſh county [h]; and an acquittal or *fine-making* in any lordſhip ſhould be no bar, if the proſecution in the Engliſh county was brought within two years [i]. But the juſtices might diſcharge ſuch offender, if convicted, upon his finding ſureties not to commit any felony, and to be of good behaviour: this was to be with the conſent of the preſident and council; it was to be only once, and then not without paying a fine. This cuſtom of *fine-making* had been very ancient in Wales, being the remains of the old juriſprudence of the country; and the parliament were tender in abrogating an indulgent law, which was ſupported by the prejudices of the people, when they thought it might be put under ſome wholeſome reſtriction.

In the ſame ſeſſions two laws were made for correcting diſorders in Wales [k]; one, to puniſh thoſe who aſſaulted and beat people, and then took refuge within the boundaries of neighbouring lordſhips; the [l] other, to introduce there the late regulations concerning clerks convict. In the following ſeſſions ſome proviſions were made of

[g] Sect. 4 and 6. [h] Sect. 6. [i] Sect. 7. [k] Ch. 11. [l] Ch. 12.

greater

greater importance than any of the preceding: these were by ſtat. 27 Hen. VIII. c. 5. 7. and 26. The firſt of theſe ſtatutes was deſigned to enforce obedience to the criminal law; and it authoriſed the chancellor to appoint juſtices of the peace, juſtices of the *quorum*, and juſtices of gaol-delivery in Cheſter and Flintſhire, and in the counties of North and South Wales, with the ſame power to execute the law, as the ſame magiſtrates had in England. The ſecond was occaſioned by ſome abuſes prevailing in foreſts in Wales; ſuch as a cuſtom for foreſters to exact fines, on various pretences, of perſons going through the foreſt, and other exactions of the like kind; all which were thereby aboliſhed.

BEFORE we take notice of the third act made in this ſeſſions concerning Wales, it will be proper to mention one which ſtands before it in the ſtatute-book, and which made a part of the ſame plan for rendering the proceſs of law more effectual, by placing every judicature in the kingdom in the hands of the king. This was the act for taking from counties palatine the prerogatives which had long been annexed to them, in derogation of the ſovereign authority of the king: it is ſtat. 27 Hen. VIII. c. 24. and is intitled, "An Act for recontinuing Liberties in the Crown;" importing, as the preamble ſtates, that "divers of the moſt ancient prerogatives and authorities of juſtice appertaining to the imperial crown of the realm had been ſevered from it by the gift of the king's progenitors, to the detriment of the royal eſtate, and the delay of juſtice." For reformation of this, it was thereby ordained, that, for the future, no perſon ſhall have authority to pardon offences committed in any part of the realm or in Wales, or the marches thereof; but that "the king ſhall have the whole and ſole power and authority thereof, united and knit to the imperial crown of this realm, as of good right and equity it appertaineth;" and none but he alone

Of counties palatine.

was

CHAP. XXVIII. HENRY VIII.

was ever after to appoint juſtices in eyre, of aſſiſe, of the peace, or of gaol-delivery, in all ſhires, counties palatine, and all other places in England, Wales, and the marches thereof.

ALL writs and indictments were for the future to alledge facts as done againſt the king's peace, and were to be in the king's name; only they were to be *teſted* in the name of the perſon who had the county palatine or franchiſe and juſtices appointed in the county palatine of Lancaſter; were to have their commiſſion under the ſeal of Lancaſter.

THERE was a proviſion in this act in favour of ſome of theſe liberties. The juſtice of *Cheſter* and *Flint* was excepted out of every alteration made by this ſtatute [n], and was therefore to exerciſe his authority according to the commiſſion he before received. The biſhop of Ely and his temporal ſteward of the iſle of Ely, the biſhop of Durham and his temporal chancellor of the county palatine of Durham, the archbiſhop of York and his temporal chancellor of the ſhire and liberty of Hexam, were to be juſtices of the peace within their ſeveral liberties, with all the authority annexed to the office of ſuch magiſtrates.

THUS were all the prerogatives enjoyed by theſe petty ſovereigns reſumed, and re-annexed to the crown; while the form of their judicial eſtabliſhment ſtill remains.

AFTER the regulations made by this act, a way was opened for a more complete reformation in the judicature of Wales; which was now undertaken on a larger ſcale, by chap. 26. of the ſame ſtatute. It is thereby, in the firſt place, ordained, that the dominion of Wales ſhould for ever be incorporated with, and annexed to, the

[n] Sect. 18.

realm

realm of England; that perſons born there ſhould enjoy all the privileges and laws of this kingdom, as natural-born ſubjects; that lands ſhould be inherited after the Engliſh tenure, without partition; and, finally, that all the laws, ordinances, and ſtatutes of England, and no other, ſhould be executed in Wales, in ſuch manner as directed by that act. To inſure the due adminiſtration of theſe new laws, it was enacted, that certain lordſhips marchers ſhould be annexed to certain Engliſh and Welch counties; and that the reſidue ſhould be divided into counties, under the names of *Monmouth*, *Brecknock*, *Radnor*, *Montgomery*, and *Denbigh*; the firſt to be taken as an Engliſh, the reſt as Welch counties[o]; and a commiſſion was to be appointed for dividing theſe new counties into hundreds, and for ſettling the diviſions of ſome others. It was further directed, that juſtice ſhould be adminiſtered in theſe new Welch counties, and in *Carmarthen*, *Pembroke*, *Cardigan*, and *Glamorgan*, according to the Engliſh law, by ſuch juſtices as the king ſhould appoint, and in ſuch form and faſhion as it then was and had been uſed in the three counties of North Wales (namely, Angleſea, Carnarvon, and Merioneth), which we have ſeen was an old eſtabliſhment, and was now the original, according to which the new arrangement was adjuſted.

It was further directed, that all courts ſhould be proclaimed and kept in the Engliſh tongue: all oaths, verdicts, and the like, were to be in Engliſh; and no perſon was to have any office who did not underſtand Engliſh. A ſaving was made of a moiety of forfeitures and fees to lords marchers, as well as all courts leet, barons, waifs, ſtrays, and other caſualties and fruits of ſeignory. There was a ſaving of uſages and cuſtoms then prevailing in North Wales; and notwithſtanding what had been declared to the contrary in the former part of the act, it

[o] Sect. 3.

was

CHAP. XXVIII.

HENRY VIII.

was provided, that lands which had been by cuſtom time out of mind partible among the heirs, ſhould ſo continue [p]. To aſcertain what the cuſtoms and laws obtaining in Wales were, a commiſſion was to be appointed to make enquiry concerning them; and ſuch as ſhould be thought by the king and his council proper to be retained, were to be continued in full force and effect [q]. In aid of this proviſion, it was alſo declared, that the king ſhould have power for three years to ſuſpend, abrogate, or alter this act [r]; and for the next five years, to erect ſuch courts and appoint ſuch juſtices within the principality as he ſhould think fit: ſo that a final and perfect eſtabliſhment of the judicial polity of Wales was reſerved for ſome future ſettlement, which was then in contemplation.

THIS was accompliſhed by ſtat. 34 and 35 Hen. VIII. c. 26. which is intitled, "An Act for certain Ordinances in Wales;" and contains the whole conſtitution of the principality, its laws and judicature. The proviſions of this act are ſaid to have been granted at the humble ſuit and petition of the king's ſubjects in Wales. It declares, that Wales, conſiſtent with the late revolution effected there, ſhould conſiſt of twelve counties; the eight ancient counties, that is, *Glamorgan*, *Carmarthen*, *Pembroke*, *Cardigan*, *Flint*, *Carnarvon*, *Angleſea*, and *Merioneth*; and the four new ones, that is, *Radnor*, *Brecknock*, *Montgomery*, and *Denbigh*; and that the limitations of hundreds, as ſettled by the commiſſioners appointed according to the late act, ſhould be obſerved.

As to the judicature of the country, it directs, that there ſhould continue a preſident and council, as before; that a ſeſſions, to be called *The king's great ſeſſions in Wales*, ſhall be held twice a-year in every county [s]; that this court ſhall hold pleas of the crown in as ample manner as the king's bench; and pleas real, perſonal, and

[p] Sect. 35. [q] Ibid. 27. [r] Ibid. 36. [s] Ibid. 4, 5, 6, 7, 8, 9.

mixed,

mixed, as completely as the common pleas in England [t]. The detail of regulations made by this act may be ſtated briefly, as follow: The ſeſſions is to laſt ſix days. Days are to be given from day to day, and from ſeſſions to ſeſſions, at the diſcretion of the juſtices. There is to be an original and judicial ſeal (for the different circuits), to ſeal all original and judicial writs and proceſs; the *teſte* of every bill and judicial proceſs to be under the names of the juſtices. All actions, real and mixed, are to be by original. Perſonal actions above forty ſhillings may be either by original or by bill; thoſe under are to be always by bill. Original bills are to be ſealed with the judicial ſeal. Fines of land with proclamations levied before juſtices there, are to be of the ſame force as fines in the common-pleas [u]. Errors of judgments before the great ſeſſions in pleas real and mixed, are to be brought by writ of error into the king's bench in England; in pleas perſonal, to be reformed by bills before the preſident and council [x]. No execution to be ſtayed by writ of falſe judgment; but in caſe the judgment is reverſed, reſtitution is to be made [y]. When there are many perſonal actions which cannot be tried at the great ſeſſions, it was ordained, that, for diſpatch, they may be heard at a petty ſeſſions before the deputy juſtices there; and further, that no ſuit ſhall be proſecuted by bill before the ſaid juſtices, under twenty ſhillings [z]. The fees of officers, for the execution of proceſs and drawing the proceedings, were fixed by the ſtatute, with authority, however, to the juſtices to alter them at their diſcretion.

Besides the ſuperior magiſtrates, the preſident and council, and the juſtices of ſeſſions, there were to be juſtices of the peace in every county [a]; their number and qualifications were ſet forth [b]; and direction was

[t] Sect. 12.
[u] Ibid. 33, 34, 35, 41.
[x] Ibid. 113.
[y] Ibid. 114.
[z] Sect. 94.
[a] Ibid. 53.
[b] Ibid. 55, 56.

given

CHAP. XXVIII. HENRY VIII.

given for the due holding of inferior tribunals, as the ſheriff's county court and tourn, with courts baron and other courts [c].

In addition to the appointment of magiſtrates, and preſcribing the bounds of their juriſdiction, ſeveral rules were laid down reſpecting the law of crimes and of property. It was ordained, that no felon ſhould be permitted to make fine (as they before had done, according to the uſage of the country, confirmed in ſome meaſure by the late act [d]), but ſhould ſuffer the law, unleſs reprieved by the judge [e]. The ſtat. 26 Hen. VIII. c. 6. concerning the trial of crimes and felons in the next Engliſh county, was confirmed; but by another clauſe of this act [f], it is declared, that if any murder or felony is committed, no one upon pain of fine and impriſonment, ſhall make an end or, agreement with the offender, unleſs he make the preſident or council, or one of the juſtices, privy thereto; a proviſion which evidently allowed a continuance of this practice.

It was ordained, that trials in the county, baron, and hundred courts, ſhould be by wager of law, or verdict of ſix men, at the pleaſure of the party who pleaded the plea [g]. In other courts, in actions perſonal, where nine of the jury were ſworn, the ſheriff may, upon default of the reſt, fill it up by a *tales de circumſtantibus* [h]. In foreign pleas triable in another Welſh county, a tranſcript of the record is to be ſent thither; but if the matter of ſuch pleas is laid in an Engliſh county, it is, nevertheleſs, to be tried in Wales [i].

The following are the proviſions relating to property. It was now finally enacted, that lands ſhould not be partible among the heirs [k], as in *Gavelkind*; but ſhould deſcend, as in Engliſh tenures. No mortgage is to be allowed but

[c] Sect. 73, 75.
[d] Vid. ant. 196.
[e] Sect. 84.
[f] Ibid. 100.
[g] Sect. 84.
[h] Ibid. 103.
[i] Ibid. 88. 89.
[k] Ibid. 91.

according

according to the courſe of the Engliſh law [l]; all perſons may ſell and alien their lands, the ſame as in England [m]; and lands there are to be ſubject to ſtatutes ſtaple, and recogniſances acknowledged in England [n]. No ſale of goods in any fair or market is to change the property [o]; nor is any perſon to buy live cattle, unleſs it is proved by witneſſes where it was bought; and this is to be obſerved under pain of a fine.

NOTWITHSTANDING ſo extenſive and complete a judicature was eſtabliſhed within the principality, there was a clauſe in this act which provided for the introduction of proceſs from the ſuperior courts, on certain occaſions. It was ordained, that, "for urgent and weighty cauſes," proceſs ſhould be made and directed into Wales by the ſpecial commandment of the chancellor, or any of the king's council, as had been uſed before [p]. There was a reſervation to the king of a power ſimilar to that given by a former ſtatute relating to the adminiſtration of juſtice in Wales, by which he was enabled, in writing under the great ſeal, to change, add, alter, order, diminiſh, and reform, all the beforementioned proviſions, as it ſhould ſeem convenient; and from time to time, at his pleaſure, to make laws for the government of Wales [q].

Of parliament.

THUS far of thoſe proviſions made by parliament for maintaining the political authority of the ſovereign. The legiſlature made ſome acts reſpecting its own conduct and conſtitution. The firſt of theſe was paſſed at the cloſe of a ſeſſion, with the neceſſity of ſuch a proviſion, no doubt, plainly before their eyes. It was enacted by ſtat. 6 Hen. VIII. c. 16. in conſideration of the many weighty matters which were often left to the end of a ſeſſion, that no member depart nor abſent himſelf till the parliament was fully finiſhed, ended, or prorogued, unleſs he had li-

[l] Sect. 92
[m] Ibid. 93.
[n] Ibid. 94, 95.
[o] Sect. 104.
[p] Ibid. 115.
[q] Ibid. 119.

cence

CHAP. XXVIII.

HENRY VIII.

cence from the ſpeaker and commons, which licence was to be entered on record in the book of the clerk of the parliament: if any did otherwiſe, he was to loſe his wages, and the inhabitants of the county, city, or borough, ſhould be diſcharged thereof.

In order to communicate to Wales all the privileges enjoyed by Engliſh ſubjects, it was ordained by ſtat. 27 Hen. VIII. c. 26. that two knights ſhould be choſen for the county, and one burgeſs for the town of Monmouth; that one knight ſhould be choſen for the county of Brecknock, Radnor, Montgomery, and Denbigh, and for every other county in Wales; and one burgeſs for every ſhire town, except Merioneth. Theſe elections were to be as in England, with the ſame fees and allowances.

The next ſtatute on this head was for imparting the privilege of being repreſented in parliament to the county palatine of Cheſter. The preamble of ſtat. 34 and 35 Hen. VIII. c. 13. ſtates, that the inhabitants of the county palatine complained of ſuffering in their property from ſevere laws, which they attributed to their bearing no part in the making of them. To ſatisfy the inhabitants, it was therefore enacted, that there ſhould be two knights for the county, and two burgeſſes for the city, to be elected by proceſs iſſued by the chancellor of England to the chamberlain of Cheſter, his lieutenant, or deputy, and from him to the ſheriff of the county; which elections and returns by the ſheriff were to be the ſame as thoſe in the county palatine of Lancaſter, and the reſt of England [r].

There was a ſtatute for better ordering the collection of the wages of knights and burgeſſes in Wales and

[r] There is another proviſion in this act, which, though relating to another ſubject, is worth notice. It was a practice in the county palatine for a perſon indebted to another to come to the exchequer there, and make oath that he would pay his creditors as ſoon as he was able: upon which the officers uſed, of their own authority, to iſſue a writ in nature of a protection, and to delay the creditors from making any demand of their debts. It was now ordained, that no ſuch writ ſhould iſſue without ſpecial warrant from the king.

Mon-

Monmouth. It ſeems that the wages of a knight was now four ſhillings a-day, that of a burgeſs two ſhillings, and it continued from their ſetting out to their return home, with the coſts of their writs, and other fees and charges. There were two writs; one, *de ſolutione fœdi militis parliamenti*; and another, *de ſolutione fœdi burgenſis parliamenti*. Theſe uſed to be ſued out by the member; and by this act the ſheriff, mayor, or other head-officer, was to make his payment within two months after ſuch writ delivered to him *.

Of the eccleſiaſtical polity.

THE laws relating to the national church, and the eccleſiaſtical polity, make the moſt remarkable part of the legiſlative acts during this reign. The attack upon the papal authority, and the reformation of abuſes among the clergy, was carried on by fits, as the king's humour directed him; and they fill, on that account, a multiplicity of ſtatutes. To arrange theſe in ſome order, and to preſerve, at the ſame time, a kind of hiſtory of this famous revolution in the church, will be attended with difficulties. Theſe acts are of different ſorts, and had different objects: ſome were deſigned to demoliſh the ancient fabric; and others to lay the foundation of a new one: ſome concerned the papal authority ſolely; others applied to matters of domeſtic regulation. It follows, that many of theſe ſtatutes being now *functa officio*, are ſunk into oblivion; while thoſe which furniſhed the baſis of our preſent eſtabliſhment in the church, are generally known. Perhaps the moſt ſatisfactory way of treating the one, would be to give alſo a detail of the other. We ſhall, therefore, take a view of the ſtatutes that relate, in any way whatever, to the church and eccleſiaſtical law, as nearly in the order in which they were made as the ſubject will permit. This will form a ſort of juridical narrative of the Reformation, interrupted ſometimes and retarded by the recital of regulations either directly or incidentally appertaining thereto, and which the nature of this work requires ſhould be ſomewhat fully enlarged upon.

* Stat. 35 Hen. VIII. c. 11.

AFTER

CHAP. XXVIII.

HENRY VIII.

AFTER the disgrace of Cardinal Wolsey, and while the affair of the king's marriage was depending, in the 21st year of this reign [s], a parliament was called, when three bills were sent up from the commons, levelled at some of the most exorbitant abuses of the clergy: one was against unreasonable exaction of fees for the probate of wills; another was for regulation of mortuaries; another was to restrain pluralities and non-residence, and to forbid the clergy taking farms.

Fees of ordinaries.

WE have before seen what provision had been made by parliament, and by provincial constitutions, for preventing extortion and imposition in the article of fees for probate and administration. Abuses, however, seem still to have maintained their ground [t]. The stat. 21 Hen. VIII. c. 5. complains of the impositions practised by ordinaries, notwithstanding two former statutes made to ascertain their fees, namely, stat. 31 Ed. III. stat. 1. c. 4. and stat. 3 Hen. V. c. 8. [u]; and it enacts, that nothing shall be taken for probate of a will, and making inventories, where the goods do not exceed five pounds, except 6d. to the clerk; where they do not exceed 40l. not more than 3s. 6d.; and where they exceed that, 5s. Thus far of testaments. It ordains, with more precision than the statute of Edward III. who shall be intitled to the administration, in case of intestacy: it directs, that it shall be granted *to the widow of the deceased*, or *to the next of his kin*, or *to both*, as the ordinary in his discretion shall think good. The same rule is to be observed where executors refuse to prove the will, and the execution of it is to be committed to the relations. The ordinary is also empowered to make his election between two or more who are of equal degree of kindred [x]; nor is any thing to be taken for such administration by the ordinary, unless the goods amount to more

[s] An. 1529.
[t] Vid. ant. 67, 68.
[u] Vid. ant. vol. II. 386; and vol. III. 256.
[x] Sect. 3, 4.

than

than 5l. and then if they do not exceed 40l. he is to take only 2s. 6d.

EXECUTORS and adminiſtrators are to give ſecurity for a due adminiſtration [y]; and taking two of the legatees, or two creditors, or, in default of them, two of the next of kin, they are to make an inventory of the effects. All perſons offending are to forfeit as much as the money taken contrary to this act; and, beſides, 10l. half to the king, and half to the party aggrieved. The act further ordains, that lands being deviſed to be ſold, the money thence ariſing, or the profits of the land, ſhall not be conſidered among the goods and chattels of the deceaſed. So that many perſons who had property of ſome value, might in thoſe days, when perſonalty was in general not large, come within the privileges above allowed to thoſe who had not 5l. in goods.

MORTUARIES, or *corſe-preſents*, were a cuſtomary due claimed by the parſon in many places upon the death of any-body. Stat. 21 Hen. VIII. c. 6. puts ſome reſtraint upon theſe demands; and ordains, that none ſhall be taken where the moveable goods of the deceaſed are under ten marks; and where they are under 30l. after all debts paid, not more than 3s. 4d. is to be taken, and in no caſe more than 10s. Mortuaries were hereafter not to be taken on the death of a way-faring man, feme-covert, child, or perſon not keeping houſe; and they were entirely aboliſhed in Wales.

THESE proviſions had a more general effect than thoſe that follow; for while they reſtrained the clergy from raiſing ſums on the people in certain fees and dues, the following act only confines the clergy to a due diſcharge of their function, by forbidding, under penalties, all other avocations. The ſtat. 21 Hen. VIII. c. 13. was made, as it ſays, among other reaſons, for "the increaſe of devotion and good opinion of the lay fee toward the ſpiritual

[y] Sect. 4.

perſons."

CHAP. XXVIII.

HENRY VIII.

perſons." It accordingly ordains, in the firſt place, that no ſpiritual perſons ſhall take lands to farm under pain of forfeiting 10l. per month. This, however, does not extend to the farming of any temporalities during the vacation of biſhoprics, or collegiate or cathedral churches; and any perſons [a] not having ſufficient glebe, may rent lands for the mere expences of their houſhold. Moreover, no ſpiritual perſons are to buy or ſell for profit any kind of merchandize, upon pain of forfeiting the thing ſo bargained, and of the contract being void; with an exception where they ſell the overplus that remains of any corn, cattle, or the like, after the ſupply of their families. No ſpiritual perſon is to keep a tan or brewhouſe, under the penalty of forfeiting 10l. per month [b].

Reſidence and pluralities.

THESE regulations were deſigned to remove the clergy from mean and gainful occupations, and to fix their attention ſolely to their ſpiritual calling. That this might be diſcharged with faithfulneſs, the next ſtep was to put pluralities and non-reſidence under ſome reſtraint. Repeated proviſions had been made by councils, and by our own provincial ſynods, to prevent plurality of benefices; but the force of theſe had been weakened by the interpoſition of papal diſpenſations [c]. In confirmation of the deſign of ſuch proviſions, and to ſhorten the hand of the pope, it was now enacted, that if any one having a benefice with cure of 8l. per ann. or above, accept of another with cure, and be inſtituted and inducted, the firſt ſhall be adjudged vacant, and the patron intitled to preſent. All diſpenſations from Rome, or elſewhere, contrary to this act, are declared void, and the procurers thereof ſubjected to the penalty of 20l. Only ſuch ſpiritual men as are of the king's council may purchaſe a diſpenſation to hold three benefices; and the following perſons to hold two: the chaplains of the king, queen, prince, or princeſs, or any of the king's children,

[a] Sect. 7, 8.
[b] Ibid. 32.
[c] Lynd. lib. 3. tit. 5. c. 2. Ayl. Parerg. Jur. Can. 414.

brothers,

brothers, uncles, or aunts; of all lords ſpiritual and temporal, and peereſſes; the chaplains to the chancellor, treaſurer, and comptroller, ſecretary of ſtate, dean of the chapel, almoner, maſter of the rolls, the chief juſtice of the king's bench, the warden of the cinque ports; as alſo, the brothers and ſons of temporal lords and knights, doctors and batchelors of divinity and law, being admitted ſuch by the univerſity, and not by grace only.

THE papal canon law and our own conſtitutions had not been more ſtrict on the article of pluralities, than that of reſidence; but the interpoſition of the legiſlature was deemed as neceſſary in the latter caſe as in the former. The preſent ſtatute directs, that every one promoted to an archdeaconry, deanry, or dignity, in any cathedral or collegiate church, or beneficed with a parſonage or vicarage, ſhall be perſonally reſident on one of them at leaſt; and if he abſent himſelf for one month together, or two months at ſeveral times in one year, he ſhall forfeit 10l. for every default, with a penalty on thoſe who procured diſpenſations from Rome, as in the caſe of pluralities: a ſimilar exception was made in favour of the following perſons: thoſe in the king's ſervice beyond ſea; ſcholars reſiding at any univerſity for ſtudy; chaplains to the king or any of the royal family, and lords ſpiritual and temporal and peereſſes; the chaplain of the chancellor; treaſurer of England; the chamberlain and ſteward of the houſhold, treaſurer and comptroller; knights of the garter; chief juſtice of the king's bench (and by ſtat. 25 Hen. VIII. c. 16. all the judges of that court, and of the common-pleas, the chancellor and chief baron of the exchequer, and the attorney and ſolicitor-general; and by ſtat. 33 Hen. VIII. c. 28. the chancellor of the duchy of Lancaſter [d], and the groom of the ſtole); warden of the ports; maſter

[d] By the ſame act this privilege was given to ſome great officers of the courts erected ſince the former acts, namely, the chancellor of the court of augmentations, the chancellor of the court of firſt-fruits and tenths;

CHAP. XXVIII.

HENRY VIII.

maſter of the rolls; ſecretary; dean of the chapel; almoner; ſuch chaplains being attending and dwelling without fraud or covin in the houſholds of the above perſonages. The following perſons were alſo excepted, being in thoſe days uſually eccleſiaſtics: the maſter of the rolls; dean of the arches; the chancellor or commiſſary of any biſhop; ſuch of the twelve maſters in chancery, and twelve advocates of the arches, as were ſpiritual men. The king is permitted to give licence of non-reſidence to his chaplains; which ſeems to be only a confirmation of the common law; for the king's clerks were never bound to reſidence, and there was an old writ *de non reſidentiâ clerici regis*[c].

THERE was a clauſe that forbid a beneficed perſon taking a parſonage or vicarage in farm, or any profit or rent out of it, upon pain of forfeiting 40s. for every week, and ten times the value of the profit or rent; and the like penalty of 40s. for every week that he received any ſtipend or ſalary to ſing for a departed ſoul[f].

THE temporal lords were earneſt in paſſing theſe three bills, and the ſpiritualty as ſtrongly oppoſed them. It was ſaid, that complaints of abuſes and pretended reformations were ſet on foot only to diſgrace the clergy, and were the ordinary beginnings of hereſy. The clergy without doors were equally clamorous againſt them; while the acts were, on the other hand, ſecretly promoted by the king.

THO' the latter ſtatute affected the pope's authority in matter of pluralities, non-reſidence, and diſpenſations; yet this, and the whole of theſe three acts were rather regulations of a domeſtic nature, than ſuch as could be conſidered in the light of attacks on the papal juriſdiction. However, they

tenths; the maſter of the wards and liveries; each of the general ſurveyors of the king's lands; the treaſurer of the court of augmentations. The chaplains of perſons mentioned in this act were to go twice a-year to their benefice, and there reſide eight days, or forfeit forty ſhillings for every neglect.

[c] Vid. ant. vol. II. 293.

[f] Sect. 30.

ſhewed

ſhewed the pope what the king meant to do, if he went on to offend him, and how readily the parliament would give their concurrence. The clergy ſuffered a ſevere blow by theſe laws; for they not only felt an immediate reſtraint, and loſt a preſent profit, but a door was opened for the many mortifying regulations which ſoon followed [g].

THESE begun to appear in two years; for, after ſtat. 23 Hen. VIII. c. 9. which provided againſt citing any perſon out of the dioceſe where he reſided, except in caſes of prerogative-adminiſtration in the archbiſhop's court, and in caſes of hereſy, the foundation of the breach that afterwards followed with the ſee of Rome was laid, by an act for reſtraining the payment of firſt-fruits to that court, upon the acceſſion to any biſhoprick. This act is chap. 20. of the ſame ſtatute. It was thereby provided, that if any biſhop preſented to the pope was delayed on the above or any other account from his biſhoprick, he ſhould be conſecrated by the archbiſhop, and if an archbiſhop, by two biſhops, and then inſtalled, in the ſame manner and to the ſame effect as if the pope had concurred. That the court of Rome might have no juſt cauſe of complaint, in reſpect of making out bulls for ſuch biſhops and archbiſhops, they were allowed to pay for them 5l. in the hundred of the clear profits of their ſees.

THE king did not intend that things ſhould be hurried to extremities at once; and this bill was only deſigned as a temperate meaſure to bring the pope to terms. It did not therefore receive the royal aſſent; but was to be held forth as a proviſional regulation, till the king had compounded this claim of firſt-fruits with his holineſs, or prevailed upon him entirely to renounce it. In the mean time, the whole conduct and direction of this tranſaction was to be left to the king, who was empowered to declare, within a certain period, whether this bill ſhould be in force or not. Some

[g] Burn. Ref. vol. I. 80.

CHAP. XXVIII.

HENRY VIII.

months after, on the 9th of July, 1533, the act was finally ratified by letters patent.

THE breach with the see of Rome was much forwarded by stat. 24 Hen. VIII. c. 12. against appeals. It declares, in maintenance of the ancient law of the land, and the statutes [h] often made to support it, that all causes testamentary, causes of matrimony, divorces, rights of tithes, oblations, and obventions, shall be heard and finally determined within the king's jurisdiction and authority, and not elsewhere; notwithstanding any inhibitions, appeals, or other process, from the see of Rome, or elsewhere; and it is declared, that all sacraments and religious ceremonies shall be performed, notwithstanding any excommunication or interdict that might be issued [i]. The penalty of a *præmunire* was denounced on those who sued at Rome in defiance of the regulations of this act. The order of appeal was directed to be in the following manner: from the archdeacon or his official to the bishop; from the bishop or his commissary to the archbishop of the province; from the archdeacon of an archbishop to the court of arches or audience; and from thence to the archbishop himself: all these respective appeals were to be within fifteen days after judgment or sentence, and such as were before the archbishop, were to be determined without appeal. It was further added, that all causes of the above kind, in which the king had any interest, should, if any appeal was brought by the party grieved, be finally determined by the spiritual prelates and other abbots and priors of the upper house, assembled by the king's writ in convocation: a provision which had a view to the king's divorce then depending. There is added, a saving of all prerogatives heretofore enjoyed by the archbishop of Canterbury in all cases of appeal.

[h] Meaning the statutes of Edward I. and III. those of Rich. II. and Henry IV. against foreign jurisdiction. Vid. ant. vol. II. 157, 376. 370. and vol. III. 162. 164.

[i] Sect. 2.

AT

AT length, in the 25th year of this king [k], the pope's authority was totally deſtroyed by three ſtatutes, ch. 19, 20, 21.; for ch. 14. of this ſtatute, which repealed ſtat. 2 Hen. IV. c. 15. and confirmed ſtat. 5 Rich. II. ſtat. 2. c. 5. and 2 Hen. V. ſtat. 1. c. 7. concerning the puniſhing of heretics, had another object; except in one clauſe, which declares it ſhall not be hereſy to ſpeak againſt the ſee of Rome, as ſome ignorant people imagined it was. However, ſome reſtraint was by that act impoſed on the arbitrary proceeding of the ſpiritual courts in caſes of hereſy; and, as it ſo far put an effectual limitation on the eccleſiaſtical power, this act muſt be conſidered as favourable to the Reformation [l].

Submiſſion of the clergy.

THE firſt of thoſe three laws abovementioned is the *ſubmiſſion of the clergy*, then ſitting in convocation; and it was now to be paſſed in parliament. The clergy thereby acknowledged, that all convocations had been, and ought to be, ſummoned by the king's writ; and they promiſed *in verbo ſacerdotii*, that they would never make nor execute any new canons or conſtitutions without the royal aſſent to them. As many canons had been received which were found prejudicial to the king's prerogative, contrary to the laws, and heavy to the ſubject; it was ordained, that a committee ſhould be appointed of thirty-two perſons, ſixteen of the two houſes, and as many of the clergy, to be named by the king, who ſhould make enquiry and have full power to abrogate and confirm ſuch canons as they thought it expedient, with the king's aſſent. Appeals to Rome were once more condemned by parliament; and all appeals are directed to be made according to ſtat. 24 Hen. VIII. c. 12. juſt mentioned; only an appeal is by this act given from the archbiſhop's court, and from places exempt, to the king in chancery; upon which a commiſſion is to be directed to ſuch perſons as the king ſhall name,

[k] An. 1534. [l] Burn. Ref. vol. I. 142.

as

CHAP. XXVIII. HENRY VIII.

as in cases of appeals from the admirals court. This court of appeal has been since called the *Court of Delegates*.

TILL the reformation of the ecclesiastical law was made, it was declared, that such canons, constitutions, ordinances, and synodals provincial, being already made, and not repugnant to the laws, statutes, and customs of the realm, nor to the hurt of the king's prerogative, should be used and executed as before[m]: upon which saving, and the former usage of the kingdom, depends the present practice of the ecclesiastical courts; as the designed reformation of that law has never been effected. We shall, however, have occasion hereafter to make some observations on the steps taken for bringing about this reformation.

THE second of these acts is chap. 20. which confirms the former statute concerning the non-payment of first-fruits: and further enacts, that bishops shall no longer be presented to the see of Rome, nor shall sue out any more bulls there; but that all bishops should be presented to the archbishop, and an archbishop to the other archbishop, or to any four bishops whom the king should name. When any see is vacant, the king is to grant a licence, or *congé d'élire*, to the dean and chapter to proceed to a new election, and therewith to send a letter missive containing the name of the person whom they are to elect; and if they delay the election for twelve days, the king is to nominate by letters patent. The person elected or nominated is to swear fealty to the king, and a commission is to issue for consecrating and investing him; after this he is to do homage to the king, and to be put in possession of the spiritualities and temporalities. The dean and chapter, or the bishop or archbishop, neglecting for twenty days to perform their parts, as prescribed by this act, are subjected to the penalty of a *præmunire*.

Papal authority abolished.

NEXT follows the famous act for discharging the subject from all dependence on the papal see[n]. The preamble

[m] Sect. 7, [n] Chap. 21.

complains

complains of the intolerable exactions for Peter-pence, penſions, impoſitions, and bulls, which were contrary to the laws of the kingdom, and grounded on the uſurpations and abuſes of the pope in granting diſpenſations; whereas it ſtood, ſays the act, with natural equity and reaſon, that the king and parliament only ſhould have power to diſpenſe with laws, or to authoriſe ſome elect perſon to exerciſe that ſupreme authority. And foraſmuch as the Convocation had recognized the king as ſupreme head of the church of England, therefore it was enacted, that all payments made to the apoſtolic chamber, and all papal proviſions, bulls, and diſpenſations, ſhould from thenceforth ceaſe; and, for the future, all diſpenſations or licences for things not contrary to God's law, but only to the law of the land, ſhould be granted within the realm; that is, by the archbiſhop of Canterbury, who is to grant them, in ſuch caſes as had been formerly uſed: and further, all diſpenſations which uſed to be taxed at Rome at or above 4l. were to be confirmed under the great ſeal. When the archbiſhop refuſed to grant ſuch diſpenſations, the party might have a writ of chancery for him to ſhew cauſe for his refuſal; upon which his reaſons were to be examined, and juſtice done in the caſe [o]. There is a clauſe in this act which declares, that it was not intended to decline from the catholic faith of Chriſtendom [p]. The exemptions of monaſteries was confirmed; and they were declared not to be ſubject to any viſitation from the archbiſhop; but they were brought under the king's juriſdiction, who might grant a commiſſion to viſit them. Power was given to the king and council to reform all indulgences and privileges which had been granted by the ſee of Rome. The offenders againſt this act was ſubjected to a *præmunire*.

This law, by cutting off the trade of indulgences about divine laws, which had been ſo gainful to the church, gave

[o] Sect. 17. [p] Ibid. 19.

great

CHAP. XXVIII.

HENRY VIII.

great eaſe to the people. Not only the pope's power was hereby rooted out, but the religious houſes now ſaw themſelves within the king's power. This was aggrandized ſtill more by the authority this act gave him of abrogating all its proviſions by his letters patent, if he ſo pleaſed.

BUT the king's ſupremacy was not directly eſtabliſhed by parliament till the following year, when it was enacted by ſtat. 26 Hen. VIII. c. 1. that the king ſhall be taken as "the only ſupreme head in earth of the church of Eng-"land, called *Anglicana Eccleſia*; and ſhall have all au-"thority thereto annexed, to reform and correct all er-"rors, hereſies, and abuſes, which may be amended by "any ſpiritual juriſdiction whatſoever."

WHEN the king had been inveſted with this entire ſovereignty over the church, it ſeemed like bringing things only into their old courſe, to give to him the firſt-fruits and tenths, which had been ſo lately taken from the pope: this was done by ſtat. 26 Hen. VIII. c. 3. It was in order to promote the good government of the church, that the primitive inſtitution of ſuffragan biſhops was provided for by ſtat. 26 Hen. VIII. c. 14. Every biſhop was to preſent two perſons to the king, who was to nominate one to be ſuffragan. The towns to which ſuffragans were to be appointed, with their duty and privileges, are mentioned in the act [9].

HENRY may now be conſidered as having completed the whole of his plan againſt the biſhop of Rome; the remaining ſtatutes on this ſubject being rather in aid of thoſe already paſſed, than introductory of any thing entirely new. By ſtat. 27 Hen. VIII. c. 15. the commiſſion of thirty-two perſons to reviſe the canon law, was intended to be maintained. Ch. 28 of the ſame ſeſſions, for diſſolving the leſſer monaſteries, may be conſidered as a continuation of the ſcheme for humbling the clergy, and ſeems to have

[9] Vid. Burn, Ref. vol. I. 151.

been

been foreboded by the late acts; that againſt diſpenſations, and that to eſtabliſh the king's ſupremacy. The monaſteries diſſolved by this act, were thoſe of only 200l. per ann. and under.

An amendment was made by ſtat. 28 Hen. VIII. c. 13. in the late law of non-reſidence. Many perſons had availed themſelves of the privilege allowed to ſtudents in the univerſities; and, under that character, lived there in idleneſs, inſtead of reſiding at their livings. This act declares, that perſons above forty years old ſhall not be intitled to the privilege of that exemption; unleſs they are ſome of the heads and governing part of the univerſity or colleges, or readers in divinity. Thoſe under forty years muſt be ſuch as attend at the ordinary lectures, diſputations, and exerciſes, of the place; unleſs they are readers in ſome of the liberal ſciences. The laſt ſtroke at the papal power ſeems to have been made by ſtat. 28 Hen. VIII. c. 16. which declares all bulls, briefs, faculties, and diſpenſations, of what kind ſoever, heretofore granted from the ſee of Rome, to be void, and of no effect. As this act was only levelled at the many juriſdictions, privileges, and exemptions, that were claimed in different parts of the kingdom under the ſanction of papal grants, it was neceſſary, in order to avoid much confuſion, to add proviſos to this ſweeping clauſe: there is accordingly a ſaving of all marriages, appointments of biſhops, ordinations, and the like; and further, of all ſuch caſes as might legally be diſpenſed with by the archbiſhop of Canterbury; which, however, were to be confirmed under the great ſeal: ſo that all theſe matters, inſtead of papal authority, would henceforth ſubſiſt only by virtue of this ſtatute.

The remaining ſtatutes relating to the Reformation are the following, which may be paſſed over in a ſhort way, without any great loſs to the hiſtorical lawyer. By ſtat. 31 Hen. VIII. c. 9. the king was empowered to create biſhops by letters patent; by chap. 13. of the ſame ſeſſion, all the

remaining

CHAP. XXVIII.

HENRY VIII.

remaining monaſteries were diſſolved; and by chap. 14. was paſſed the law of the ſix articles, which, being an ordinance of a very penal nature, will more properly be conſidered hereafter, as well as ſome other ſtatutes relating to heretics and offenders on the ſcore of religion. By ſtat. 32 Hen. VIII. c. 26. the king was empowered to appoint a commiſſion of biſhops and ſome clergy to agree on a form of religion, for the obſervance of the whole nation; and by ſtat. 34 and 35 Hen. VIII. c. 1. ſome proviſions were made about *Tindal*'s books; which alſo being of a penal nature, will come under that diviſion of the ſtatutes of this reign.

THUS have we traced the progreſs of thoſe meaſures by which this great revolution in our eccleſiaſtical polity was effected. The many ſtruggles between the ſpiritual and temporal juriſdiction, in former periods, had ended moſt commonly to the advantage of the clergy; but, in this reign, a new light was let in upon the nation, and the people, under the auſpices of this ſpirited prince, were at length delivered from the yoke of blind and implicit obedience. The church was declared an entire and perfect body within itſelf, with authority to decree and regulate all things without dependance on any foreign power; and the ſupremacy thereof was annexed to, and united with, the imperial crown of the realm; ſo that a way was opened for all that followed in the next reign, to complete the reformation of religion. In the mean time, the eccleſiaſtical courts continued to poſſeſs all the detail of juriſdiction which they exerciſed in former times, except that they now had before their eyes the injunction of the late ſtatute, to abſtain from ſuch doctrines as were repugnant to the law, ſtatutes, and cuſtoms of the realm, and the king's prerogative.

BEFORE we take leave of eccleſiaſtical matters, it will be proper to notice what alterations were made by parliament reſpecting ſome articles which were of a ſpiritual concern:

concern: theſe are, marriage, the collecting of firſt-fruits and tenths, and the payment of tythes.

IT had been the ancient cuſtom of the chancery, that the ſix clerks, curſitors, and all others, except the clerk of the crown, ſhould be unmarried, being originally all real clerks; and upon their marriage, they forfeited their places. This cuſtom had gone out of uſe as to all, except the ſix clerks, who were ſtill bound to the old rule. There was therefore an act made on purpoſe, namely, ſtat. 14 and 15 Hen. VIII. c. 8. to enable them to marry, without prejudice of forfeiture. The clergy, who had the entire government of the eccleſiaſtical courts till this reign, had preſerved the rule there inviolate, and they allowed no perſon who was lay or married to exerciſe any eccleſiaſtical juriſdiction: but now when all ſpiritual juriſdiction was declared to flow from the crown, as ſupreme head, and it was rather wiſhed that the adminiſtration of juſtice there ſhould not be in the hands of perſons entirely devoted to the church, it was enacted, by ſtat. 37 Hen. VIII. c. 17. that all perſons, as well lay as married, being doctors of the civil law, might be chancellor, vicar-general, commiſſary, official, ſcribe, or regiſter, and exerciſe all juriſdiction eccleſiaſtical, as any others, being ſpiritual perſons, might do.

THE other ſtatutes concerning marriage regard pre-contracts, and the degrees within which perſons might marry. When Henry had married Anna Boleyn, and the act of ſucceſſion, ſtat. 35 Hen. VIII. c. 22. was paſſed to ſettle the crown upon the deſcendants of this new union, it was thought prudent by every poſſible means to ſtigmatize the marriage with Catharine as unlawful. Accordingly, a clauſe was inſerted [r], which declared all marriages within the degrees there mentioned (all which were both Levitical and canonical, and that with a brother's wife is one) to be

[r] Sect. 3. 4.

unlawful,

CHAP. XXVIII.

HENRY VIII.

unlawful, and that perſons ſo related might be ſeparated by the ſentence of the ordinary. When this act was repealed by the ſecond act of ſucceſſion, ſtat. 28 Hen. VIII. c. 7. and the crown ſettled in another manner, this ſame prohibition was re-enacted, as the law of God, which no human power could diſpenſe with. It was moreover declared, that the meaning of theſe prohibitions was, that if it chanced for any man to *know carnally* any woman, then all perſons related to ſuch woman within the above degrees, ſhould be adjudged within the prohibitions [t], which was a refinement of the canon law upon this ſubject, and has been mentioned in a former place [u].

The legiſlature had in this caſe given parliamentary ſanction to the doctrines of the canon law, reſpecting ſome of the prohibitions to marriage from conſanguinity or affinity; but in ſtat. 32 Hen. VIII. c. 38. they took another courſe, and made a ſolemn declaration againſt the whole of the pontifical law upon this head, and alſo upon that of pre-contracts. The preamble of that act complains, that upon pretence of former contracts not conſummate by carnal copulation, marriages conſummated were diſſolved and children baſtardiſed: further, that marriage was prohibited by other impediments which had been invented only to be diſpenſed with; as kindred or affinity between couſins-german, and ſo to the fourth and fifth degree [x]; carnal knowledge of any of the ſame kin or

[t] Sect. 11. 12. The degrees of marriage prohibited by this act are theſe: "The ſon to marry his mother or ſtep mother carnally known by his father; the brother his ſiſter; the father his ſon's daughter or his daughter's daughter; the ſon to marry the daughter of his father procreated and born of his ſtep-mother; the ſon to marry his aunt, being his father's or mother's ſiſter; to marry his uncle's wife, carnally known by his uncle; the father to marry his ſon's wife, carnally known by his ſon; the brother to marry his brother's wife, carnally known by his brother; any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's ſon's daughter, or his wife's daughter's daughter, or his wife's ſiſter."

[u] Vid. ant 58.

[x] There ſeems to have been a variety in the canon law upon this point. By a conſtitution of archbiſhop

or affinity before in ſuch outward degrees: all which the act pronounces to be contrary to God's law, and tending to great ſcandal, as perſons were continually hunting after ſome pre-contract, kindred and alliance, or carnal knowledge, to make void a marriage that they were tired of. To correct this, it was now declared, by ſtat. 32 Hen. VIII. c. 38. that all marriages contracted between lawful perſons, that is, perſons not prohibited by God's law to marry, being ſolemnized in the face of the church, and conſummate with bodily knowledge, or fruit of children, ſhall be judged good and indiſſoluble, notwithſtanding any pre-contract not conſummate with bodily knowledge. It was moreover declared, that no prohibition, God's law excepted, ſhould impeach any marriage without the Levitical degrees. Conſidering what had paſſed before, the proviſion in this act againſt pre-contracts is very remarkable, and at that time gave occaſion to much cenſure upon the proceedings againſt Anna Boleyn; for that which was now ſo much condemned, was then made the pretence for diſſolving the marriage with her. Some endeavoured to reconcile this inconſiſtency by a wiſh in the king, indirectly to take away the impediment to the ſucceſſion of her daughter Elizabeth. The other branch of the ſtatute was to make way for the king's marriage with Catharine Howard, who was couſin-german to Anna Boleyn; this being one of the prohibited degrees by the canon law, but not by the Levitical degrees. The preamble ſtates, as a reaſon for the act, that "what ſparks "remained of the papal legiſlation might kindle hereafter

biſhop Lanfranc, none was to marry his own kin, or that of a deceaſed wife, or the widow of a deceaſed kinſman, within the ſeventh degree. He reſts this on a decree of Gregory the Great: but that pope, in his preſcript to St. Auguſta, allowed marriage in any degree beyond the fourth. A decree of that pope, to the effect Lanfranc intimates, is to be found in the Decretum; but is by later canoniſts pronounced to be an error of Gratian [a]. There is a canon which allows thoſe in the fifth degree to marry, and forbids thoſe in the fourth to be ſeparated, if married: this canon is attributed to Theodore of Canterbury [b].

[a] Cauſ. 35. Quæſt. II. and III. c. 16.; and Johnſon's Canons.

[b] Ibid. c. 20.; alſo vid. ant. 58.

"a great

CHAP. XXVIII.

HENRY VIII.

"a great flame; and, at leaſt, while they remained, "might ſhew that the pope's power was not entirely "extinct."

WHEN firſt-fruits and tenths of ſpiritual preferments were given to the crown, by ſtat. 26 Hen. VIII. c. 3. ſeveral regulations were made for the due payment and ordering of this new revenue. Theſe were ſucceeded by many other proviſions, as ch. 17. of the ſame ſtatute, ſtat. 27 Hen. VIII. c. 8. 28 Hen. VIII. c. 11. 32 Hen. VIII. c. 22. and 34, 35 Hen. VIII. c. 17. all which go into a particular detail of arrangement, much of which has been ſuperſeded by later ſtatutes, and on that account, as well as the minuteneſs of the ſubject, is little worthy of attention.

Tythes.

IT was endeavoured to render the payment of tythes more regular, by aſſiſting the eccleſiaſtical proceſs. By ſtat. 27 Hen. VIII. c. 20. if any one diſobeyed the proceſs of the ſpiritual court, and the ordinary made application to one of the king's council, or to two juſtices of the peace, they have power to commit the party, till he find ſecurity to obey the ſentence of the court. It was again enacted, by ſtat. 32 Hen. VIII. c. 7. that all perſons ſhall duly ſet out their tythes and offerings; and if they omit, they may be convened in the ſpiritual court, and ordered to pay coſts; and two juſtices may, as in the former caſe, commit the party to gaol, till he gave ſecurity to perform the definitive ſentence. As tythes, and other ſpiritual dues, ſince the diſſolution of monaſteries, had come more into lay hands than before, it was thought proper to give the like common-law remedies as were in uſe for lay fees. It was therefore ordained, that any parſonage, vicarage, portion, penſion, tythes, oblations, or other eccleſiaſtical or ſpiritual profits in lay hands, might become a ſubject of controverſy, in a *præcipe quòd reddat*, *aſſiſe of novel diſſeiſin*, *mortaunceſtor*, *quòd id deforceat*, writ of dower and other writs original, as the caſe might require;

require; and that fines and other common-law assurances might be made of them. But it was provided, that suits for subtraction of tythe or offerings should still be in the ecclesiastical court, as before [y]. By stat. 37 Hen. VIII. c. 12. a number of regulations were devised respecting the payment of tythes in London. It seems a decree had been made by the archbishop of Canterbury, the chancellor Audley, and others of the council, to settle a course for the due payment of tythes in the city: upon this there issued letters patent, and a proclamation directed to the citizens to enforce the execution of it; and by stat. 27 Hen. VIII. c. 21. all tythes and dues were directed to be paid in pursuance of this decree, until further order should be made therein by the king and the thirty-two persons who were to be employed in reforming the ecclesiastical law. After this, several disputes arose on the construction of this decree; and the parsons and citizens had agreed to submit their differences to the archbishop, the chancellor Wryothesley, and several others of the council: these parsons made another decree, which is inserted in the present act, and is thereby required to be observed.

Such was the history of this famous revolution in our ecclesiastical polity. Having disposed of this, we are at liberty to proceed to the provisions which were made for the better ordering of the civil state. Of these, the first regard is due to a regulation for marshalling the higher ranks of society according to their respective dignities. We have hitherto met with no example in our statute-book of any direction upon this head. The first is by stat. 31 Hen. VII. * c. 10. "For placing of the lords." It was a part of the king's prerogative to give such honour, reputation, and place to his councellors, and others, his subjects, as seemed best to his wisdom; and such prerogative is asserted in these very words in the preamble of this statute; but

Precedence.

[y] Sect. 7.

* This must mean 31 Hen the VIII for Henry VIII did not reign so many years JL—

CHAP. XXVIII.

HENRY VIII.

the king was content that order ſhould now be taken in his high court of parliament for aſcertaining the degrees of precedence. It was therefore enacted, that no perſon, except the king's children, ſhould ſit at any ſide of the cloth of ſtate in the parliament chamber, whether the king was preſent or not. And becauſe, ſays the act, the king is ſupreme head in earth of the church of England; and for the good exerciſe of the ſaid moſt royal dignity and office, he had appointed Thomas Lord Cromwell his vicegerent; he and all perſons having that office ſhould be placed on the right ſide of the parliament chamber, on the ſame form with the archbiſhop of Canterbury, and before him, and ſhould always have voice to aſſent or diſſent, as the lords of parliament [a]. Next to him was the archbiſhop of Canterbury, then York, then London, Durham, Wincheſter, and then the other biſhops; all on the ſame ſide, according to their ancienties, as had been accuſtomed. It ſeems that no order had before been made for aſſigning any place to the following officers in reſpect of their office; but they were now placed in this way: The lord chancellor, lord treaſurer, lord preſident of the king's council, and lord privy-ſeal, being of the degree of barons, or above, were to ſit on the left ſide of the parliament chamber, on the higher part of the form, above all dukes, except ſuch as were the king's ſon, brother, uncle, nephew, or brother's or ſiſter's ſons: the great chamberlain, the conſtable, the marſhal, the lord admiral. The great maſter, or lord ſteward, and the king's chamberlain, were to ſit in this order: after the lord privy-ſeal, above all perſons of the ſame ſtate or degree; the king's chief ſecretary, being a baron, was to ſit above all barons; and if a biſhop, before all biſhops, not having any of the be-

[a] The appointment of Cromwell was intirely upon principles of canonical regulation. We have ſeen what was the office of *vicar-general*; and that he might be appointed by biſhops or popes. Conſidering the king's preſent title of Head of the Engliſh church, his vicar-general could not but be placed before the archbiſhop of Canterbury. Vid. ant. 5.

fore

forementioned offices. All dukes, not before mentioned, marquiſſes, earls, viſcounts, and barons, not having ſuch offices, were to be placed according to their ancienty, as had been accuſtomed. If the lord chancellor, lord treaſurer, lord preſident of the king's council, lord privy ſeal, or chief ſecretary, were under the degree of a baron, they were to be placed at the uppermoſt part of the ſacks, in the midſt of the parliament chamber, either there to ſit on one form, or upon the uppermoſt ſack, in the order beforementioned.

THIS order of precedence was to take place not only in the parliament chamber, but alſo in the trials of peers; and in the ſtar-chamber, and other aſſemblies of council, the chancellor, treaſurer, preſident, privy-ſeal, the great chamberlain, the conſtable, marſhal, lord admiral, grand maſter, or lord ſteward, the king's chamberlain and chief ſecretary were to obſerve the rank hereby given.

WE proceed now from the higheſt to the loweſt; from the different degrees of honour, to the various deſcriptions of poverty and wretchedneſs. We have ſeen what regulations had been made in former reigns for the ſuppreſſion of beggars and vagabonds[b]. The increaſe of theſe evils is evidenced by various ſtatutes made in this reign for the correction of them. It has been a favourite opinion, that the proviſion for the poor had never become an object of neceſſity, till the abolition of religious houſes had deprived many perſons of a ſupport from the donations there regularly made; but the firſt ſtatute we ſhall mention, was paſſed before that event, and is nothing more than a continuance of the policy which had been begun many years before. It was enacted, by ſtat. 22 Hen. VIII. c. 12. that juſtices of the peace, mayors, ſheriffs, bailiffs, and other officers of counties, cities and towns, ſhould divide themſelves, and make diligent ſearch within their diviſions, for all aged, poor, and impotent

The poor laws.

[b] Vid. ant. vol. III. 171.

CHAP. XXVIII. HENRY VIII.

perſons, who were of neceſſity compelled to live by alms; and ſuch perſons they were to authorize to beg within a certain hundred, city, town, pariſh, or other limit, as it ſhould ſeem beſt to them in their diſcretion. The names of ſuch perſons were to be put in a roll, a copy to be certified to the juſtices in ſeſſions, and a letter was to be delivered to ſuch beggars, under ſeal, ſignifying they had authority to beg. Any perſon begging without ſuch licence, and beyond his limit, was to be whipped, or ſet in the ſtocks three days and three nights, during which he was to be kept on bread and water. This was to be by order of a juſtice or high conſtable, who was after that to limit him a place where he might beg, and give him a licence.

THUS far of impotent perſons. It was further provided, that if any perſon *being whole and mighty in body*, and able to labour, was taken begging, or vagrant, and could give no reckoning how he lawfully got his living, he might be brought before a juſtice of peace, high conſtable, mayor, or other officer of the place, who might direct him to be whipped out of the place at the end of a cart, till his body was bloody: and he was to take an oath to return to the place where he was born, or where he laſt dwelt before the puniſhment for the ſpace of three years, and there labour as a true man ought to do. He was to have a letter teſtifying the time and place of his puniſhment, whither he was going, and what time was limited for ſuch journey, within which time he was permitted to beg by the way. As often as he violated the terms of this letter he was to be whipped, till he arrived at the appointed place and betook himſelf to labour. If the perſon ſo whipped was idle, and no common beggar, he was to give ſecurity, ſhould the officer think proper, for repairing to his place of birth or reſidence as beforementioned.

To ſecure the execution of this regulation, juſtices of the peace were, in their ſeſſion, to enquire of the defaults

of

of towns in ſuffering begging, and impoſe fines on the inhabitants.

But no proviſion was made for the treatment of vagrants when they arrived at the place of ſettlement, nor for charging the inhabitants with the maintenance of the poor and impotent, or ſetting to work the valiant vagabonds. To remedy this, it was ordained by ſtat. 27 Hen. VIII. c. 25. that the public officers of ſuch places ſhould take order for the reception and ſupport of ſuch as were unable to labour, and for the putting to work ſuch as were, under penalty of forty ſhillings for every month they ſhould neglect. For this purpoſe they were to gather alms with boxes every Sunday, holiday, and other feſtival, or otherwiſe among themſelves. All perſons paſſed away in the above manner were allowed at every ten miles to call on the conſtable of the place to provide them meat, drink, and lodging, for one night.

Such public officers were to take up all children in every pariſh within their limits under fourteen and above five years of age, that were found begging and in idleneſs, and appoint them to maſters of huſbandry, or other crafts or labours, to be taught, and ſo be enabled to get their living; and they were to give them ſome of the charitable contributions to equip them for ſuch ſervice. Such as refuſed to go to ſervice, or who departed from it without reaſonable cauſe, being above twelve and under ſixteen years, were to be publicly whipped.

Once in every month the above public officers were to cauſe privy ſearch to be made, by night or by day, as they thought proper, for vagabonds and ſuſpected perſons, and all perſons were to aſſiſt in ſuch ſearch. Thoſe found a ſecond time in a ſtate of vagrancy were not only to be whipped, but to have the upper part of the griſtle of the right ear clean cut off; which was to be performed by the conſtable, with the aſſiſtance of a ſubſtantial inhabitant of the pariſh. For a third offence he was to be commit-

CHAP. XXVIII.

HENRY VIII.

ted to prison by a justice, and then indicted for wandering and loitering; and if found guilty, he was to suffer death as a felon and enemy of the commonwealth.

All common doles were forbid, and no person was to give alms in that or any other way, but only to the common boxes and gatherings before directed to be made. Bodies corporate, who by their institution were to distribute alms out of their revenue, were now required to give it, at the usual times, in money to such common boxes and gatherings. The churchwardens in every parish, calling to them six or four of their honest neighbours, had authority once a quarter to call such collector before them to give an account of money collected, and in what manner it was employed: and if any was embezzled or misapplied, he was to be committed to prison by a justice, mayor, or other officer of the place, till he restored the said sum. An account of all such receipts and disbursements was to be kept yearly by the minister or some other honest man of the parish; the book to be in the custody of the constables and churchwardens, two or three of them, or some other indifferent man, and not the minister. There was a penalty of twenty shillings upon parishes that neglected to promote public collections. The act contains several other clauses, some of which were designed for turning the course of private charities, whether of monasteries or well-disposed persons, to these public boxes and gatherings; some were to save mendicant friars from incurring the penalties inflicted on beggars, and religious persons from any restraint on giving to poor almsmen established in their houses, or to casual travellers, or to shipwrecked mariners, or other distressed objects; in short, that they might give alms in such manner as would not encourage common begging and vagrancy.

Such were the regulations made in the reign of this king for the disposal of beggars and vagrants. These seemed particularly to deserve our attention, because they contain the

the outline of the more enlarged ſyſtem for the government of the poor, which was ſo much improved in the next reigns, and finally ſettled in that of Elizabeth. The laws made in this reign relating to the other branches of the inferior orders of ſociety, the labouring part, ſuch as *journeymen*, *apprentices*, and *artificers*, need not engage ſo much of our time; becauſe moſt of them were not of a general import, but were calculated for particular trades and employments under particular circumſtances. The wages of ſervants in huſbandry, artificers, and labourers, were preſcribed by ſtat. 6 Hen. VIII. c. 3. a penalty was impoſed on thoſe who took more; the hours of work and of meals were alſo ſettled. No maſter was to compel his apprentice to engage by oath or bond not to open a ſhop. The exaction of high fees for the admiſſion of apprentices to their freedom was guarded againſt[b]. Theſe with various other proviſions of a more partial nature were made by parliament.

Of trade.

NUMBERLESS are the proviſions made in this king's reign for the protection and advancement of domeſtic trade and manufactures. Inſtead of encouraging foreigners, as heretofore, it was now endeavoured to collect all mercantile employment into the hands of natural-born ſubjects. Upon this principle various obſtructions were placed in the way of foreigners who carried on any trade; and regulations were deviſed for better qualifying the riſing generation. By ſtat. 14 and 15 Hen. VIII. c. 2. no ſtranger born out of the king's obedience, whether denizen or not, and uſing any handicraft, was to have any apprentice, nor more than two journeymen, unleſs natural-born ſubjects. Strangers and their wares were to be ſubject to the inſpection of the wardens and fellowſhips of handicrafts in the city. Upon a petition of the tradeſmen of London complaining of foreign artificers, a decree was made in the ſtar-chamber in 20 Hen. VIII. and was confirmed by ſtat. 21 Hen. VIII.

[b] Stat. 28 Hen. VIII. c. 5.

c. 16.

CHAP. XXVIII. HENRY VIII.

c. 16. By this, among other things, it was directed, that no ſtranger artificer ſhould have more than two ſtranger ſervants; but being a houſholder, he might have as many Engliſh ſervants and apprentices as he pleaſed. Thoſe not being houſholders, nor keeping a ſhop at the time of the act, were forbid to keep any houſe, ſhop, or chamber, to exerciſe their craft or myſtery; which was only a revival of a regulation made in the reign of Rich. III [c]. This proviſion was again renewed by ſtat. 32 Hen. VIII. c. 16. which likewiſe makes void all leaſes of a dwelling houſe or ſhop to any ſtranger artificer not being a denizen; nor was ſuch a perſon thenceforward to take any leaſe on pain of forfeiture; and both leſſor and leſſee was to pay 100 ſhillings. It is remarkable among thoſe jealous proviſions againſt ſtrangers, it was over and over ordained, that ſuch perſons, not being denizens, ſhould be bound by all the laws and ſtatutes of the realm. Among the laws reſpecting trade may be reckoned ſeveral ſtatutes for regulating the dreſs of all ranks of perſons; theſe were frequently repealed and new ones made, as experience ſucceſſively demonſtrated the difficulty of ſubjecting ſuch matters to parliamentary reſtrictions [d]. Many other ſtatutes were made for the conducting of different manufactures, of which, as well as of the other acts of this and the following reigns, it may be obſerved in general, that they had a tendency to give preferences to corporations and fraternities, and to encourage a ſpirit of monopoly.

Dreſs

THE policy ſet on foot in the laſt reign, of turning the attention of farmers from paſturage to agriculture, was promoted by ſeveral ſtatutes in this reign. If any one ſuffered a houſe of huſbandry to go to decay, or converted tillage into paſture, the immediate lord of the fee was intitled to ſeize a moiety of the offender's land till the offence was reformed [e].

[c] Stat. 1 Rich. III. c. 9.

[d] Stat. 6 Hen. VIII. c. 1. 7 Hen. VIII. c. 6. 24 Hen. VIII. c. 13.

[e] Stat. 7 Hen. VIII. c. 1. and vide ſtat. 25 Hen. VIII. c. 13.

BEFORE

Eſcheators.

BEFORE we enter upon the laws relating to private property, we ſhall briefly ſpeak of one or two proviſions that principally reſpected tenures. The abuſes, probably, introduced under the late adminiſtration of Empſon and Dudley, made it neceſſary to add to the number of thoſe acts that had already been paſſed for the taking of inquiſitions by eſcheators and commiſſioners [f]. The complaint now was, that ſometimes untrue offices were found, ſometimes offices were changed, and ſometimes ſuch were returned as had never been found. To remedy this it was enacted, in the firſt year of this reign [g], that no eſcheator or commiſſioner ſhould return an inquiſition or office concerning lands or hereditaments, unleſs found or preſented by twelve men under their ſeals and indented, under penalty of 100l. All eſcheators and commiſſioners were to have lands of forty marks per ann. Inquiſitions were to be taken in an open place, according to the ſtatutes, and every one was to be at liberty to give evidence openly before the inqueſt. The jurors were to have a qualification of eſtate of forty ſhillings annually. A counterpart of the inquiſition ſealed and indented was to remain with the foreman. The inquiſition, when found, muſt be received by the eſcheator; the clerk of the petty bag, or officer of the exchequer, if returnable there, was required to receive the return from him; and the clerk of the petty bag was to certify a tranſcript of all inquiſitions into the exchequer. No one was to be eſcheator for more than a year. All theſe qualifications were enforced with penalties.

THE time of traverſing an inquiſition, which was confined by a former ſtatute [h] to a month after the return, was enlarged to three months, and all grants made previous to that time were to be void [i]. By an act of the ſame ſeſſion, all inquiſitions found in the laſt reign by procurement of

[f] Vid. ant. vol. II. 373. and vol. III. 273.

[g] Stat. 1 Hen. VIII. c. 8.

[h] Stat. 8 Hen. VI. c. 10.

[i] Stat. 1 Hen. VIII. c. 10.

Empſon

CHAP. XXVIII.

HENRY VIII.

Empſon and Dudley, intitling the king to tenures *in capite*, were allowed to be traverſed, notwithſtanding the parties might have ſued livery; and it was declared ſuch livery ſhould not conclude them[k].

THE law of private rights was affected by ſeveral ſtatutes during this reign, many of which were not leſs important than thoſe we have been relating. The ſtatutes upon this head either regard the properties and incidents of eſtates, or the modes by which they may be conveyed. Of theſe the former claim our firſt attention. We ſhall begin with ſome ſtatutes which ever ſince have had very extenſive influence upon leaſes of lands.

Terms for years.

IT was in conſequence of the new practice of ſuffering recoveries, that it was now thought neceſſary to enlarge a proviſion made in the reign of Edward I*. to protect termors. As that act ſpeaks of a leſſee having an action of covenant, it was concluded that no leſſees but thoſe by deed could be protected by it. The new ſtatute includes both leaſes by indenture, and thoſe without writing. As a leaſe for years was an intereſt iſſuing out of, and dependent on, the inheritance and freehold of the leſſor, it derived all its ſtrength from the goodneſs of that title, and by it muſt ſtand or fall. Thus a term lay at the mercy of the freeholder, who now had a method by which he could deſtroy his own eſtate, namely, by a fictitious recovery, and ſo deſtroy the intereſt of his leſſee. This device was often practiſed to get rid of tenants who had excited envy by the great improvements they had made, or had any way diſobliged their landlord. To prevent an injuſtice of this kind, and at once give ſtability to theſe contracts, and inſure to the cultivator of the ſoil the reward of his toil and expence, was an object worthy the attention of parliament. It was accordingly ordained, by ſtat. 21 Hen. VIII. c. 15. that all leſſees for years ſhould be enabled to falſify theſe re-

[k] Stat. 1 Hen. VIII. c. 12. * Vid. ant. vol. II. 150.

coveries,

coveries, and maintain their leaſes againſt the recoverors, as againſt their leſſors. It was further provided, that no ſtatute merchant, ſtatute ſtaple, nor execution by *elegit*, ſhould be made void by any feigned recovery.

AFTER this, a term for years became a permanent and certain intereſt; the value of which might be eſtimated by the period of time for which it was created, without calculating the contingency of an untimely diſſolution, to which it was before ſubject. Long terms, as they could now be purchaſed with ſafety, became more common. They were ſoon after this converted to the purpoſe of raiſing portions for children by mortgage, or otherwiſe, in family-ſettlements; and by the aid of the ſtatute of uſes, became the object of much of that artificial ſtile of conveyancing which began about this time to gain ground.

Leaſes of tenant in tail.

WHEN the intereſt of leſſees was protected againſt the feigned recovery of the freeholder, it was thought equally expedient to give them ſome ſecurity againſt the iſſue of a tenant in tail, who claiming by a title paramount the anceſtor, could avoid any leaſes made by him for longer term than his life. A like inconvenience was felt in other inſtances of leaſes made by perſons who had only a life-eſtate. To remedy all this, the following proviſion was made by ſtat. 32 Hen. VIII. c. 28. All leaſes, ſays that ſtatute, made by indenture for years, or for life, by any perſon ſeiſed in fee, or in tail, in his own right, or in the right of his church or wife, or jointly with his wife, ſhall be good and effectual in law, the ſame as if the leſſor was ſeiſed in fee ſimple, provided they are made under the following circumſtances; if they are not made to any leſſee having an old leaſe (unleſs the old leaſe be expired, or ſurrendered within a year next after the making of the new one); and if they are not made in reverſion. It was alſo required, that the land ſhould have been moſt commonly letten to farm, or occupied for the laſt twenty years; that the leaſe be not made without impeachment of waſte, nor be for above

CHAP. XXVIII. HENRY VIII.

above twenty-one years, or three lives; and that there be reſerved yearly ſo much rent as had been moſt accuſtomably paid for the laſt twenty years. Moreover, where the inheritance belongs to the wife, ſhe muſt be a party, and the rent reſerved to the huſband and wife and *her* heirs, according to the eſtate ſhe has; and the huſband is not in any caſe to alien ſuch rent any longer than during the coverture, otherwiſe than by fine [l]. No act of the huſband during the coverture ſhall cauſe a diſcontinuance, or be any wiſe prejudicial to the wife, or her heirs. It was provided [m], that this act ſhould not be conſtrued as giving a power to any parſon or vicar to make leaſes of his land, tythes, or other profits belonging to his church, otherwiſe than he could at common law.

THIS is the ſubſtance of what has ſince been called the *Enabling Statute*; becauſe it empowered certain perſons to make ſuch leaſes as they could not before make: and it is ſo called in contradiſtinction to ſome acts paſſed in the reign of queen Elizabeth, which impoſed certain reſtraints on church leaſes; and are thence called the *Reſtraining Statutes.*

THE intereſt of leſſors and leſſees came under the contemplation of the legiſlature in another point of view. This was occaſioned by the diſſolution of religious houſes; which gave riſe to a proviſion calculated not only to remove an inconvenience which was particularly felt at that time, but ſuch as would increaſe daily, while a diſpoſition and power to alien land prevailed. Covenants in leaſes, like other covenants, could only operate between the parties and their privies; that is, thoſe who were heirs or executors to the covenantors or the covenantees; ſo that grantees of reverſions of lands held of religious houſes, who were now a very conſiderable body among the landholders of the kingdom, could not avail themſelves of the

[l] Sect. 6. [m] Ibid. 4.

benefit

benefit of covenants in leaſes granted to their tenants; and tenants, on the other hand, were deprived of advantages ſtipulated by their former landlords. The firſt proviſion on this head was ſtat. 31 Hen. VIII. c. 13. which gave to the king all advantage, whether of covenants, conditions, or the like, as the leſſor would have had. By ſtat. 32 Hen. VIII. c. 34. this was extended to the grantees of the king; and further, to make this equitable remedy univerſal, mutual redreſs is given, in all caſes of landlord and tenant, where the former grants his reverſion to another.

A DEFECT of the old law reſpecting executors was ſupplied in the ſame ſeſſions by ſtat. 32 Hen. VIII. c. 37. The executors of perſons ſeiſed of rents could not, any more than their heirs, recover the arrearages which had accrued in the teſtator's life-time. This act provides, that the executors and adminiſtrators of any perſon ſeiſed in fee-ſimple, in tail, or for life, of rents or fee-farms, may have an action of debt, or diſtrain for all arrears due at the death of his teſtator, or inteſtate; as may a huſband, ſeiſed as aforeſaid in right of his wife, after the death of his wife, for the like rents or fee-farms due and unpaid in her life; and a perſon ſeiſed during the life of another, after the death of *ceſtui que vie*, and ſo may his executors or adminiſtrators.

AN alteration made reſpecting jointenancy and tenancy in common ſeems dictated by the neceſſities of a commercial people. The idea of property poſſeſſed by two or more perſons, where each has in him the *entire whole*, and *every parcel* of that whole, as joint tenants are ſaid to have, is a ſubtilty in juriſprudence which ſavours much of the age in which it was conceived. That every parcel of this undivided whole ſhould ſurvive to the longeſt liver, was, perhaps, no more than a conſequence of the original refinement. But this conſequence was found very prejudicial to credit; as property, that ſhould ſatisfy demands

CHAP. XXVIII.

HENRY VIII.

demands on the eſtate of the deceaſed, was abſorbed by a ſtranger, whoſe only merit was the fortune of having ſurvived his joint owners. The unity of poſſeſſion between tenants in common, likewiſe, though not ſubject to the doctrine of ſurvivorſhip, had, however, its inconveniencies, to which a clear and ſeveral eſtate was not liable. Theſe eſtates we have ſeen were diviſible only by the conſent of the parties[n]; and it was now thought deſirable, that means ſhould be provided for compelling thoſe who might unreaſonably withhold their conſent. It was accordingly enacted, by ſtat. 31 Hen. VIII. c. 1. that joint tenants, and tenants in common, of any eſtate of inheritance, in their own right, or in right of their wives, may be compelled to make partition, by writ *de partitione faciendâ*, to be deviſed in the chancery, in like manner as coparcenors are compellable by the common law. As this act was confined to eſtates of inheritance, the proviſion of it is extended, by ſtat. 32 Hen. VIII. c. 32. to tenants for life and years; and alſo where one perſon has an eſtate for life or years jointly, or in common with another who has an eſtate of inheritance or freehold.

A PIECE of old law relating to entry on land, and the tolling of entry by a diſcent *, underwent an alteration which has prevented ſome of the injuſtice which uſed to follow from that notion. It was hard that a diſſeiſor, becauſe he died ſeiſed, ſhould thereby intirely deprive the injured perſon from making his entry, and purſuing his legal remedy upon it; but oblige him to reſort to a more tedious proceeding. It was therefore enacted, by ſtat. 32 Hen. VIII. c. 33. that the dying ſeiſed of ſuch diſſeiſor ſhall not be deemed a diſcent in law, ſo as to toll the entry of the diſſeiſee, or his heirs, unleſs the diſſeiſor

[n] Vid. ant. vol. III. 349.

* Vid. ant. vol. III. 19.

had

had been in peaceable poſſeſſion for five years after the diſſeiſin.

SOME changes were made in the law of eſtates, by the two following acts. By ſtat. 31 Hen. VIII. c. 3. it was ordained, that certain lands in Kent *, which deſcended according to the cuſtom of gavelkind, ſhould thenceforward be deſcendible as common-law eſtates; the other was, an act which put ſome further reſtraint upon gifts to ſuperſtitious uſes.

Gifts to ſuperſtitious uſes.

THERE were ſome gifts of land, which, not being within the ſtatutes of mortmain, had very much increaſed. It was thought expedient to reſtrain theſe alienations, as equally prejudicial to the community with thoſe in mortmain. This was done by ſtat. 23 Hen. VIII. c. 10. which makes void all diſpoſitions of land to the uſe of pariſh-churches, chapels, church-wardens, guilds, fraternities, commonalties, companies, or brotherhoods, erected for devotion, or by common aſſent, without incorporation; and alſo diſpoſitions to the intent to have *obits* perpetual, or ſervice of a prieſt for ever, or for ſixty or eighty years. As the age became enlightened, gifts of this kind were viewed with a leſs favourable eye. Theſe ſentiments concurring with the deſigns of the enterpriſing prince upon the throne, contributed towards the general attack which was ſoon after made on one branch of ſuch inſtitutions, the religious houſes. Theſe repoſitories, where ſo much wealth had been accumulating for ages, were broken open, in purſuance of ſtat. 27 Hen. VIII. c. and ſtat. 32 Hen. VIII. c. and, happily, their contents were once more permitted to mix in the national circulation.

NEXT to the laws reſpecting the nature and properties of eſtates, we proceed to thoſe which related to the conveyance of them. Several regulations were made for the confirmation of fines and recoveries, as aſſurances of

* Vid. ant. vol. II, 310.

land;

CHAP. XXVIII.

HENRY VIII.

land; and ſome of a very particular kind were made for the better ordering of uſes and wills.

Of common recoveries.

THE application which had lately been made of common recoveries, rendered them a very intereſting object of parliamentary notice. As they were become a common aſſurance of eſtates, they began to deſerve every ſupport which could be given them. It was common to ſuffer recoveries of land for the performance of wills, for ſurety of jointures, and other eſtates; and as ſuch recoveries were had by mere conſent and agreement, as a conveyance of the title, it was held, that as the recoverors came in merely under the eſtate of the recoverees, they had no power by law to compel the attornment of the tenants, nor could they obtain their rents and ſervices by diſtreſs or action; and where an advowſon was appendant, and an avoidance fell, they had no remedy for a diſturbance. They are therefore enabled by ſtat. 7 Hen. VIII. c. 4. to diſtrain, and make avowries for rents, ſervices, and cuſtoms, and bring a *quare impedit*, as thoſe perſons, againſt whom the recovery was had, might have done. This act was confined to diſtreſſes and avowries for rents, ſervices, and cuſtoms. As a recoveror could not, upon this ſtatute, have an action of debt againſt a leſſee for years, nor *waſte* againſt a tenant for life, or years, theſe defects are cured by ſtat. 21 Hen. VIII. c. 15. and ſuch actions are given in the ſame manner to the recoverer as the leſſor might have had them.

THIS proviſion as to avowries, was of uſe where the tenant was known; but it often happened, that, by ſecret conveyances to uſes, lords were at a loſs on whom to make their avowries; the ownerſhip of the land often paſſing without any notice, or ſign of alienation. It was for this reaſon enacted, by ſtat. 21 Hen. VIII. c. 19. that lords diſtraining *may* avow on the land, as in land within their fee, or ſeigniory, without naming or making

avowry

avowry on any perſon in certain. As the ſtatute uſes the word *may*, lords have their election to avow according to the ſtatute, or, as they before did, at common law [p].

To return to the proviſions made reſpecting common recoveries. It was declared by ſtat. 32 Hen. VIII. c. 31. that a recovery of land had by aſſent of parties againſt a tenant by curteſy, tenant in tail after poſſibility of iſſue extinct, or tenant for life, ſhould be void, with regard to thoſe in reverſion or remainder, unleſs it was by good title, or aſſent of thoſe in reverſion or remainder. In this manner, by obviating the abuſe of it, did the parliament tacitly acknowledge and ratify the application of a recovery as an aſſurance of land. So intirely were recoveries conſidered as a common aſſurance and conveyance, that where they were ſuffered of lands held of the king, a fine was required by a clauſe in the ſtatute of wills, ſtat. 32 Hen. VIII. c. 1. to be paid for the writ of entry in the chancery, the ſame as for alienation, by fine or feoffment.

Some doubts had ariſen, whether the indirect and general wording of the ſtatute of fines paſſed in the laſt reign, might not bear a conſtruction which would make a fine to be taken as a bar to an eſtate-tail. In the 19th year of the king, this queſtion was ſolemnly argued at Serjeant's-inn; when it was held by three juſtices, that the iſſue were not barred; and by five, that they were [q]. The former inſiſted that the iſſue were aided by the ſecond ſaving clauſe; the iſſue being neither party nor privy, but as ſtrangers claiming by the donor. The latter denied this; holding the iſſue clearly to be privy to the fine levied by their anceſtor. However, if any doubt remained, an act was now made to remove it; and it was declared by ſtat. 32 Hen. VIII. c 36. that a fine levied by a tenant in tail of full age, according to ſtat. 4 Hen. VII. ſhould be a ſufficient bar to

[p] 1 Inſt. 268. b. [q] 19 Hen. VIII. 6.; and alſo Dyer, 2. 1.

himſelf

CHAP. XXVIII.

HENRY VIII.

himſelf and his heirs claiming by force of ſuch entail. There was in this act an exception in favour of the inheritance of a huſband, protected by ſtat. 11 Hen. VII. c. 20 *. and of lands where the reverſion was in the king; ſo that a fine of ſuch land, levied by tenant in tail, remains intirely on the conſtruction of ſtat. 4 Hen. VII. The parliament took the ſame care of the king's intereſt in the caſe of recoveries, as in the caſe of fines; for it was declared by ſtat. 34 and 35 Hen. VIII. c. 20. that no reverſion in the king ſhould be barred by a recovery. This was not before the point had been agitated in court. In the 29th of the king, it had been held by the judges, that a recovery ſuffered by tenant in tail, though a bar to the iſſue, ſhould be no diſcontinuance of the tail, and ſo no bar of the king's reverſion; but *Shelley* doubted [r]. Among the proviſions for giving ſtability to theſe ſecurities, we may reckon ſtat. 37 Hen. VIII. c. 19. As none of the ſtatutes of fines extended to the county palatine of Lancaſter, it was thereby ordained, that fines levied before the juſtices of aſſiſe there, proclaimed three ſeveral days the ſeſſions they were ingroſſed, and three ſeveral days the two next ſeſſions, ſhould have the ſame force as fines levied in the court of common-pleas.

THE principal proviſions upon the nature of conveyances were ſuch as concerned uſes and wills; two ſubjects which were very intimately connected in their circumſtances, and now went hand in hand in the regulations the parliament thought proper to deviſe reſpecting them. We ſhall therefore, conformably with the idea that prevailed at the time, take a view of theſe ſtatutes together, whether they relate to uſes or wills, in the order in which they were made, as the moſt natural one for illuſtrating this important branch of our law of real property.

Deviſe of land.

IN the laſt reign ſome relaxation had been given to the general law which reſtrained a deviſe of lands. We have

* Vid. ant. 140.

[r] 28 and 29 Hen. VIII. Dyer, 32, 1.

ſeen

ſeen what indulgence had been given to perſons in the king's wars to make feoffments to the uſe of their wills, without licence. Again, in this reign, by ſtat. 3 Hen. VIII. c. 4. a permiſſion was given to tenants *in capite* to alien without licence, and if they left a ſon within age, their executors, feoffees, or aſſigns, were to have the ward and marriage towards the performance of the will. By ſtat. 14 and 15 Hen. VIII. c. 14. thoſe in the king's ſervice, in the wars, might alien their lands for the performance of their wills, without a fine for alienation, with the ſame indulgence as to ward and marriage. Theſe were partial regulations, calculated for the benefit of perſons under very particular circumſtances.

A DISPOSITION to favour deviſes of land diſcovered itſelf afterwards in a more general way, in ſtat. 21 Hen. VIII. c. 4. Land deviſable by cuſtom was very often left for executors to ſell; and in ſuch caſe, if one of them refuſed to join in the ſale, the ſale could not be legally perfected by the others [s]. It was enacted by this act, that in ſuch circumſtances, where any of the executors refuſed to take upon them the burthen of the adminiſtration, a ſale by thoſe who did act, ſhould be good and valid. Though the letter of this act extends only to executors who have a *power to ſell*, yet, being a beneficial law, it has received a liberal conſtruction, and has been conſidered as taking in caſes where land is *deviſed to* executors to ſell; that is where they have not barely a power, but a power coupled with an intereſt.

HITHERTO we ſee the power of deviſing land received ſome favour from the parliament; but this matter was taken up again in a very different way: the power of deviſing the uſe of lands, carried the general power of transferring property by will much further than was conſiſtent with the nature of tenures. It tended to deprive lords of their

[s] Vid. ant. vol. III.

CHAP. XXVIII.

HENRY VIII.

wards, marriages, and reliefs, and the king of his *primer seisins* and livery, with other casualties, which constituted a great part of the old revenue of the crown. We have seen in the former reign, that the statutes which were made to protect the lord's claims upon a descent on the death of *cestui que use*, contained an exception of cases where a will was declared [t]. This excited a great jealousy, both in the king and other great landholders. The king, in the 22d year of his reign, caused a bill to be drawn, which was to moderate the consequences of this innovation: it was intended by this bill, that every one should have free liberty to dispose of half of his lands, in the way of devise; and he told the parliament, if they would not take a reasonable thing, when offered, he would seek out the extremity of the law, and would not offer so much again. This act passed the lords, but was rejected by the commons. The king, disappointed by this failure, consulted the judges and eminent lawyers, and the question was solemnly argued in chancery, where, we are told, it was decided, that a man could not bequeath any part of his land in prejudice of his heir [u]; a proposition, of which there could be little doubt, if it is to be understood of the devise of *land*, and which, notwithstanding, left the question, as to declarations of uses, where it was. The only remedy was to destroy uses entirely; and it was with that view that the statute of uses was procured some few years after.

Statute of uses.

THE mischiefs arising from uses were not confined to the single object of feudal claims on land, but infected almost every transaction concerning landed property. These mischiefs were not subdued by the remedies the legislature had already, at different times, applied. Indeed one of those remedies, the statute of Richard III. had somewhat increased the perplexity before complained of, that of divers claims to the same land. That statute had enabled the

[t] Vid. ant. 139.

[u] Burn. Ref. vol. I. 112.

cestui

ceſtui que uſe to make feoffments and other aſſurances of his land, while the feoffees ſtill continued their common-law right over it. The conſequence of this was, that the *ceſtui que uſe* might limit an eſtate for life, or in tail, or make a leaſe of the land; and the feoffee, perhaps, might do the ſame, having each an equal right.

THUS, purchaſers were never ſafe while two perſons had the diſpoſal of the ſame land. But the numerous other inconveniences attending uſes, as recited in the ſtatute, made it neceſſary to apply ſome fundamental remedy to theſe diſorders. This was meant to be effected by the famous ſtatute of uſes, 27 Hen. VIII. c. 10. What the opinion of that age was upon this ſubject, and what was the deſign and plan of that ſtatute, cannot be better collected than from the title and preamble of it. It is intitled, "An Act "concerning Uſes and Wills." And the preamble ſtates, that "Whereas, by the common laws of this realm, "lands, tenements, and hereditaments, be not deviſable "by teſtament, nor ought to be transferred from one to "another, but by ſolemn livery and ſeiſin, matter of re- "cord, writing ſufficient made *bonâ fide* without covin "or fraud; yet, nevertheleſs, divers and ſundry imagina- "tions, ſubtle inventions, and practices, have been uſed, "whereby the hereditaments of this realm have been con- "veyed from one to another by fraudulent feoffments, fines, "recoveries, and other aſſurances craftily made to ſecret "uſes, intents, and truſts; and alſo by wills and teſta- "ments, ſometime made by *nude parolx* and words, ſome- "time by ſigns and tokens, and ſometime by writing, and "for the moſt part made by ſuch perſons as be viſited by "ſickneſs, in their extreme agonies and pains, or at ſuch "time as they have ſcantly had any good memory or re- "membrance; at which times, they, being provoked by "greedy and covetous perſons lying in wait about them, "do many times diſpoſe indiſcreetly, and unadviſedly, "their lands and inheritance; by reaſon whereof, and by

CHAP. XXVIII.

HENRY VIII.

"occaſion of which fraudulent feoffments, fines, recove-
"ries, and other like aſſurances to uſes, confidences, and
"truſts, divers and many heirs have been unjuſtly, at ſun-
"dry times, diſherited, the lords have loſt their wards,
"marriages, reliefs, heriots, eſcheats, aids *pur faire fits*
"*chevalier & pur file marier*, and ſcantly any perſons can
"be certainly aſſured of any lands by them purchaſed, nor
"know ſurely againſt whom they ſhall uſe their actions or
"executions, for their rights, titles, and duties; alſo men
"married have loſt their tenancies by the courteſy,
"women their dower; manifeſt perjuries by trial of ſuch
"ſecret wills and uſes have been committed; the king's
"highneſs hath loſt the profits and advantages of lands of
"perſons attainted, and of the lands craftily put in feoff-
"ments to the uſes of aliens born, and alſo the profits of
"waſte for a year and a day of lands of felons attainted;
"and the lords their eſcheats thereof; and many other in-
"conveniences have happened, and daily do increaſe
"among the king's ſubjects, to their great trouble and
"inquietneſs, and to the utter ſubverſion of the antient
"common laws of this realm: for the extirping and ex-
"tinguiſhment of all ſuch ſubtle practiſed feoffments,
"fines, recoveries, abuſes and errors," this act was made. Such is the preamble of the act uſually called *the ſtatute of uſes*; and in all pleadings and deeds, the ſtatute for *transferring uſes into poſſeſſion*, or the ſtatute for *conveying the poſſeſſion to the uſe*.

If one ſtatute of Richard III. had added to the former miſchiefs of uſes, another furniſhed a hint for the entire deſtruction of them. That monarch, while duke of Gloceſter, had been infeoffed to uſes, either jointly with others, or by himſelf. To obviate the notion of law, that the king cannot be ſeiſed to a uſe, and the manifeſt injuſtice of his holding ſuch lands diſcharged of the uſe; it was provided by that act, that where he was joint feoffee, the other feoffees ſhould ſtand ſeiſed to the uſes without him; and

where

where he was ſole ſeiſed, the land ſhould be veſted in the *ceſtui que uſe*, in the ſame manner as he had the uſe. In a ſimilar way, the ſtatute of uſes enacts, that, when any perſon ſhall be ſeiſed of lands, or other hereditaments, to the uſe, confidence, or truſt of any other perſon or body-politic, the perſon or corporation intitled to the uſe in fee-ſimple, fee-tail, for life or years, or otherwiſe, ſhall from thenceforth ſtand and be ſeiſed, or poſſeſſed of the land, of and in the like eſtate as they have in the uſe, truſt or confidence; and that the eſtate of the perſon ſo ſeiſed to the uſe, ſhall be deemed to be in them that have the uſe, in ſuch quality, manner, form, and condition, as they had before in the uſe. Thus the ſtatute executes the uſe, as it is termed; that is, transfers the uſe into poſſeſſion; by which means the *ceſtui que uſe* becomes completely poſſeſſed of the land in law, as he was before in equity.

No form of words could be imagined more ſimple, and, at the ſame time, more efficacious for the annihilation of uſes, than the purview of this act. By a kind of legal magic, the whole frame of landed property ſeemed on a ſudden to be changed; and every man, who before had only the uſe of his eſtate at the mercy (almoſt) of his feoffees, was made, in an inſtant, the complete and lawful owner of it. The parliament ſeem not to have foreſeen that any uſe could ſurvive the operation of this ſtatute, or any new one be created, except only on a bargain and ſale; and as ſoon as that was diſcerned, an act was made in the ſame ſeſſions[x] to put ſome guard to theſe tranſactions, by requiring them, when they concerned any freehold intereſt, to be by deed indented and inrolled. They deſigned, moſt certainly, that lands ſhould paſs no longer by limitation of uſe, but by formal livery on the land, matter of record, or ſome other common-law conveyance, as mentioned in the preamble of the ſtatute.

[x] Chap. 16.

THE

CHAP. XXVIII.

HENRY VIII.

THE courts of law, inſtead of ſending ſuitors to ſeek relief in chancery, began now to take cogniſance of uſes, which were become legal eſtates; and one would have thought the learning of landed property was, by this ſtatute, once more ſettled on the pure and ſimple principles of the common law: how far theſe expectations were anſwered, will be ſeen in the ſequel.

THERE are other material articles in this ſtatute. It is provided [y], that there ſhall be a ſaving to all feoffees of ſuch former right, title, entry, intereſt, poſſeſſion, rents, cuſtoms, ſervices, and actions, as they might have had at common law: upon which ſaving, much of the reaſoning concerning the condition of the feoffees was afterwards founded. Where [z] perſons have a uſe or intereſt in annual rents iſſuing out of lands, they are to be adjudged in poſſeſſion and ſeiſin of the rent in ſuch like eſtate, as they had in the uſe, in the ſame manner as if they had a conveyance from thoſe who were ſeiſed to the uſe.

Jointures.

THERE is another clauſe in this act, which deſerves a more particular notice; that is, the proviſion reſpecting *jointures*. When the ſtatute had ordained, that thoſe who had the uſe of land ſhould be thenceforward conſidered as *ſeiſed* of the freehold and inheritance, it was foreſeen that the following caſe might happen: that, immediately upon paſſing the act, as every man would become *ſeiſed*, there would accrue a title of dower to his wife, who, perhaps, had an eſtate in jointure made to her on her marriage, and ſo would now enjoy a double proviſion, namely, her dower and jointure both. It was thought expedient that this ſhould be prevented; and it was accordingly enacted, that where there are lands ſettled to a man and his wife and the heirs of the huſband, or to the huſband and wife and the heirs of their two bodies begotten, or the heirs of one of their bodies begotten; or to the huſband and wife for

[y] Sect. 3. [z] Ibid. 5.

their

their joint lives, or the life of the wife; or to any perſon to the uſe of the huſband and wife, or of the wife ſolely, for her jointure; that, in all theſe caſes, the wife ſhall not be intitled to dower. But[a], ſhould ſhe be evicted of all or any part of her jointure, by lawful entry, or action, or even by the diſcontinuance of her huſband, ſhe ſhall be recompenſed by a proportionate endowment out of the reſidue of his lands. It was alſo provided[b], that where ſuch jointure is made after marriage, the widow may refuſe it, and demand her dower. This is the only proviſion made by ſtatute on the ſubject of jointures; ſince which, it has at different times been diſcuſſed and reſolved, what are the requiſites to conſtitute a perfect jointure, and ſuch a one as will bar dower: the intention of all which ſeems to be this, that the eſtate given to the wife in jointure ſhould be equally beneficial with her dower, and that there might be no doubt but it was given in lieu of it.

ANOTHER equitable proviſion was made by the ſtatute of uſes, to prevent ſome untoward conſequences which would enſue from the revolution thereby effected. When the perſon who had the uſe became ſeiſed of the land, his power of deviſing was of courſe gone. Now it might happen, that many perſons were under covenants made on marriage, or otherwiſe, to give ſome eſtate by will; which, ſince the ſtatute, could not be performed. This would produce inconvenience, and often injuſtice; a ſaving clauſe was therefore added, to effectuate wills made before, and within a certain period after, paſſing the act.

INDEED, the effect that the ſtatute of uſes had on the power of deviſing, was one of the moſt material conſequences which followed it. The king's grand object of preventing the infringement his caſualties of tenure ſuffered by deviſes, was moſt effectually attained: Henry

[a] Sect. 7. [b] Sect. 9.

had

CHAP. XXVIII.

HENRY VIII.

had made good the threat he had held out a few years before, which intimated a deſign to take away the power of deviſing entirely. When this reſtraint was wrought up to its higheſt pitch, the inconveniencies of it were felt too ſenſibly for it to endure long; and in a few years it was found neceſſary to allow, by expreſs ſtatute, the power of deviſing land, upon the footing that had been propoſed by the king ſome years before.

Statute of wills.

ACCORDINGLY, an act was paſſed in the thirty-ſecond year of the king [c], which, from the governing idea upon this ſubject, was intitled, *The act of wills, wards, and primer ſeiſins*, whereby a man may deviſe two parts of his land. The preamble intimates the grace and goodneſs of the king towards his ſubjects, in granting them every thing which he in his benevolence could confer; and ſtates, as a reaſon for making this act, that perſons of landed eſtates could not conveniently maintain hoſpitality, nor provide for their families, the education of their children, or payment of their debts, out of their goods and moveables. It ordains therefore, that all perſons having any manors, lands, tenements, or hereditaments, may give and diſpoſe of them, as well by laſt will, or teſtament in writing, as by an act executed in their life-time, in the following manner: If they held in ſocage, or of the nature of ſocage, and held none of the king by knight-ſervice, by ſocage in chief, nor of the nature of ſocage in chief, nor of any other perſon by knight-ſervice; or if they held of the king in ſocage, or of the nature of ſocage in chief, or of any other perſon, and none of the king or any other by knight-ſervice, they might deviſe the whole; with a ſaving to the king of his *primer ſeiſin*, and reliefs, and fines for alienation, and all other rights and dues belonging to ſocage-tenure. If they held of the king in chief by knight-ſervice, or of the nature of knight-

[c] Chap. 1.

ſervice

ſervice in chief, they might deviſe two parts, or as much as ſhould amount to the yearly value of two parts in three, in certainty, and by ſpecial diviſions, ſo as it might be known; ſaving to the king the cuſtody, wardſhip, and *primer ſeiſin*, of as much of the lands as amounted to the full yearly value of a third, without any diminution, dower, fraud, covin, or cheat, and alſo his fine for alienation. The ſame if they held of the king by knight-ſervice in chief, and had alſo other land of the king, or of any other by knight ſervice, or otherwiſe, with the ſame ſaving of cuſtody, wardſhip, *primer ſeiſin*, and fines for alienation. If they held ſome lands by knight-ſervice, and ſome in ſocage, or of the nature of ſocage, of any common perſon, then they might deviſe two parts of thoſe held by knight-ſervice, and all thoſe held in ſocage, with the ſame ſaving. If they held only of the king by knight-ſervice, and not in chief; or held by knight-ſervice, and not in chief of the king; and alſo of another by knight-ſervice; and alſo of another held other lands in ſocage, or of the nature of ſocage; then they might deviſe two parts of thoſe held of the king, and two parts of thoſe held of the others by knight ſervice, and the whole of thoſe held in ſocage; ſaving to the king and the other lords, their reſpective rights and caſualties, as beforementioned.

In all theſe caſes, if the part coming to the king did not amount to a full third, he might take into his hands as much of the other two parts as would make up a clear yearly value of the full third belonging to the king in title of wardſhip and *primer ſeiſin*, or the like; and the lord was to have a like advantage reſpecting his third part, for title of wardſhip: and all perſons were to ſue their liveries for poſſeſſions, reverſions, and remainders, and pay reliefs and heriots as before.

It was declared, that if two or more perſons held lands of the king by knight-ſervice, jointly to them and the heirs of one of them; and he who had the inheritance died,

CHAP. XXVIII.

HENRY VIII.

died, leaving his heir within age, the king ſhould have the ward and marriage of the body, notwithſtanding the life of the freeholder. Laſtly, there was a ſaving of dower out of the two parts, and to the king his reverſion of tenants in jointure or dower, if they ſhould happen to die during the minority of the king's ward.

Such is the ſubſtance of the firſt ſtatute of wills. An innovation like this could not be made without giving occaſion to an abundance of queſtions which could not be foreſeen by the makers of it; and the preſent act does not ſeem to have been framed with all that circumſpection which is ſo manifeſt in moſt of the acts of this period. In the courſe of three years, many of theſe difficulties had time to make their appearance, and ſuggeſt their own remedies. We find in 34 and 35 Hen. VIII. an act paſſed for correcting ſuch defects, intitled, "The bill con-"cerning the explanation of wills."

It is remarkable, that of the many clauſes in the former ſtatute which gave authority to different perſons to deviſe, only two of them required any particular deſcription of eſtate in the teſtator; and then the deſcription was ambiguous: theſe words were *of eſtate of inheritance*, and they were now declared to mean only an eſtate in fee-ſimple. The act goes on to ſupply the defect of the former act, and declares, that all perſons having a ſole eſtate in fee-ſimple, or being ſeiſed in fee-ſimple, in coparcenary or in common, of manors, lands, tenements, rents, or other hereditaments, in poſſeſſion, reverſion, or remainder, or rents, or ſervices, incident to any reverſion or remainder, and having no lands held of the king, or any other by knight-ſervice, might deviſe the whole. If they held them of the king in chief by knight-ſervice, or of the nature of knight-ſervice in chief, they might deviſe two parts. To explain a doubt which *Montague*, afterwards chief-juſtice, confeſſes he, among many, entertained, that

that a will of more than the two parts would [d] be void; it was declared, that a will ſhould be good at leaſt for two parts, although it was made of the whole, or of more than the two parts. The diviſion of the two parts, if not made by the teſtator, was to be made by commiſſion, granted out of the court of wards and liveries; a court which was newly erected, and will be mentioned hereafter. This was to be executed by the oaths of twelve men, and a return and certificate to be made to the maſter of the wards and liveries, who was to decide the matter.

If any held of the king by knight-ſervice, and not in chief, or held of any other by knight-ſervice (not being bodies politic and corporate), they might deviſe two parts; and any will ſhould be good for the two parts, though made for the whole, and for all other lands not held of the king, nor of any other, by knight-ſervice, nor in chief; the diviſion to be made, as in the former caſe, for as much of the lands as belonged to the king; and for as much as belonged to any other perſon, by commiſſion iſſuing out of chancery.

In explanation of the ſavings made in the former act, of cuſtodies, *primer ſeiſins*, and the like, reſpecting the third part, it was declared to apply to ſuch lands and tenements as came by deſcent, as well in fee-tail as fee-ſimple, or in fee-tail only, to the heir of the teſtator, immediately after his death; and any will was to be good, notwithſtanding it deviſed all the fee-ſimple lands: and if ſuch lands deſcending either in fee-ſimple or fee-tail, amounted not to a third, the king, or other lord, was to have as much of the others as would make up the clear yearly value of the third, in reſpect of his title of wardſhip, *primer ſeiſin*, and the like. If the king, or other lord, was evicted of his third part, he was to have the deficiency made up to him out of the other two parts.

[d] Plowd.

As

CHAP. XXVIII. HENRY VIII.

As to the fines for alienation, without licence, directed by the laſt act to be paid by thoſe who took any freehold under ſuch wills; it was declared, that they ſhould be remitted by ſuing forth the king's pardon, and paying the third of the yearly value of the lands ſo deviſed: and the chancellor was hereby empowered to iſſue ſuch pardons without applying to the king.

It was declared, that a will of lands, tenements, or hereditaments made by a feme covert, any perſon under twenty-one years, idiot, or of non-ſane memory, ſhould not be good or effectual.

In the ſpirit of a proviſion, in the ſtat. Marlb[e]. it was ordained, that if any perſon holding by knight-ſervice of the king, or another, or in chief, by will, or other act in his life, gave his manors, lands, tenements, or hereditaments, by fraud, or covin, to any one for term of years, life or lives, with one remainder over in fee, or with divers remainders over for term of years, life, or in tail, with remainder over in fee-ſimple, to any perſon, or to his right heirs, or ſhould make by fraud or covin, contrary to the intent of this act, any eſtates, conditions, menalties, tenures, or conveyances, to defraud the king of his prerogative, primer ſeiſin, livery, relief, wardſhip, marriages, or rights, or any other lord of his wardſhips, reliefs, heriots, or other profits which ſhould ariſe by the death of any tenant; then, upon office being found, the king ſhould have his right, as if no ſuch eſtate had been made, until ſuch office be legally done away by traverſe, or otherwiſe. And any other lord might bring his writ of ward, diſtrain or avow, as the caſe might be; ſaving, however, to the donees or deviſees their intereſt after the king and lord were ſatisfied. Laſtly, it was provided, that where the king, or any lord took any lands to make up his full third; the perſon from whom they were taken, ſhould

[e] Vid. ant. vol. II. 62.

obtain

obtain a contribution againſt all perſons intitled to the other two parts by bill exhibited in chancery.

THIS is the ſubſtance of the two famous ſtatutes concerning wills of land. Except in the inſtance of land deviſable by cuſtom, deviſes before theſe ſtatutes were in conſequence of ſome feoffment to the uſe of a will, ſo that the deviſe made in purſuance thereof, gave only an equitable right to be eſtabliſhed by the authority of the court of chancery, being, in fact, no more than a declaration of a uſe; but now, being authoriſed by ſtatute, a will of land became a new mode of conveyance on the death of the teſtator, cognizable in the courts of common law. So much of uſes and wills; the ſtatutes concerning which are ſtrongly allied to each other in their reaſon and conſequences, and may be conſidered as a ſyſtem of conſtitutions, forming a remarkable period in the hiſtory of landed property.

THUS far of real property. We ſhall next conſider ſome few particular inſtances of parliamentary interpoſition, for altering the modes of ſecuring property, and redreſſing injuries to perſonal eſtates, before we come to the general alterations which were made in the adminiſtration of juſtice. Firſt, of the recognizance in nature of a ſtatute ſtaple; then of bankrupts, and uſury.

THIS new ſecurity was framed by ſtat. 23 Hen. VIII. c. 6. and was denominated, after the original from whence it was framed, *A Recognizance in the nature of a Statute Staple.* The ſtatute ſtaple, as we have ſeen[f], was a charge on land, which was contrived as a ſecurity to be uſed by thoſe only who had dealings in the ſtaple; it was therefore, like the ſtatute-merchant, confined to certain perſons and places. It had, however, by a fiction lately introduced of ſurmiſing the debt to have been contracted in the ſtaple, been extended beyond its primary deſign;

[f] Vid. ant. vol. II. 393.

and

CHAP. XXVIII.

HENRY VIII.

and it was now thought expedient, by a legiſlative ſanction, to communicate the benefit of ſuch a ſecurity to all perſons who choſe to avail themſelves of it; or rather, without the circuity of a fiction, to which they before reſorted, to frame a ſimilar ſecurity for debts, that might be open to perſons of all deſcriptions. This was done by the above-mentioned ſtatute, which gives the form of the recognizance, and directs all the method of proceeding therein. It is to be acknowledged before either of the chief juſtices; or, out of term, before the mayor of the ſtaple of Weſtminſter and the recorder of London, jointly.

Statute of bankrupts.

THE firſt ſtatute of bankrupts is ſtat. 34 and 35 Hen. VIII. c. 4. and is intitled, "An Act againſt ſuch Perſons *as do make Bankrupts.*" The perſons who are the objects of this new proviſion for the recovery of debts, are deſcribed as thoſe who "craftily obtaining into their hands "great ſubſtance of other men's goods, do ſuddenly flee to "parts unknown, or keep their houſes;" ſo that the ſtatute extends to all perſons whatſoever who act as above deſcribed. A new and peculiar method of dealing with theſe defaulters is directed: the chancellor, or keeper of the great ſeal, the lord treaſurer, lord preſident, privy-ſeal, and others of the privy-council, the chief juſtices of both benches, or three of them at leaſt, whereof the chancellor or keeper, the treaſurer, preſident, or privy-ſeal, were to be one, upon complaint in writing by a party grieved, were to take order concerning the lands and goods, and alſo with the body of ſuch *offender*, for ſo he is named; and they were either to ſell his effects, or make ſuch diſpoſition of them as they ſhould think meet, ſo as every creditor had a rateable portion according to his demand; and ſuch ſale and direction was to be as good in law, as though made by ſuch offender himſelf. They were authorized to call perſons before them, and examine them upon oath touching the offender's goods. Perſons concealing effects of the offender, were to forfeit double the value of them; to be recovered

recovered by ſuch means as the lords ſhould think proper: and perſons making falſe claims of debts, were to forfeit double the ſum demanded.

If ſuch offender left the kingdom, the lords were to iſſue a proclamation commanding him to ſurrender; and if he did not comply within three months after he had notice thereof, he was to be adjudged out of the king's protection; and in ſuch caſe, ſhould any one help to convey to him his effects out of the realm, he was to ſuffer ſuch fine and impriſonment as the lords ſhould think proper to inflict [c]. The act further directs, that after a man was by theſe means ſtript of all his property, he was ſtill to be liable to all unſatisfied demands, as before that act was made.

This is the firſt draught of that ſpecies of ſummary execution againſt the perſon and effects of a debtor, which has ſince been modelled into a very different ſhape. At preſent, the bankrupt was conſidered as a criminal, whoſe delinquency could be expiated only by paying the laſt farthing. Later ſtatutes have, beſides the payment of his creditors, provided in ſome meaſure for his intereſt, rather viewing him in the light of an unfortunate man: upon that idea, his compliance with the direction of the ſeveral ſtatutes is rewarded by an immunity from his former incumbrances *, and an allowance to enable him to try his ſucceſs in the world once more. Theſe qualifications of the rigour of the firſt bankrupt-law have been added, ſince their operation has been confined totally to *traders*; tho', perhaps, a general policy, as well as a conſideration of the caſualties attending trade and commerce, would dictate ſuch a proviſion. However, as the firſt bankrupt-law completely ruined the man who was unhappily the object of it, the modern regulations are looked on by many as holding forth to a deſigning trader an unmerited indemnity, if not a proſpect of gain, at the expence of his creditors,

[c] Sect. 5. * 2 Blackſt. ch. 31.

and

CHAP. XXVIII.

HENRY VIII.

and this has tempted many to court a ſituation and character, from which, in the reign of Henry VIII. they would have ſhrunk with horror: ſo that, if the ſeverity of the firſt bankrupt-law was carried too far, the opportunity of impoſing on the eaſe of modern ones by fraud and colluſion, makes many doubt of their benefit to the community.

THE prejudices againſt uſury had worn off; and a rational commerce had taught the nation that an eſtate in money, as well as an eſtate in land, might be let out to hire, without the breach of one moral or religious duty. The parliament concurred with the opinion of the times, and by ſtat. 37 Hen. VIII. c. 9. all former acts[h] againſt uſury, as an offence, were repealed; and a certain ſum to be given for the loan of money was permitted, under the following terms and precautions: In the firſt place, it was by this ſtatute enacted, that no perſon ſhould ſell his wares or merchandize, and within three months buy them again at a lower price; nor ſhould any one by means of any corrupt bargain, loan, exchange, cheviſance, ſhift, intereſt of any wares, merchandizes, or other thing; or by any other corrupt or deceitful way or means, or by any covin or conveyance, receive or take for the forbearing or giving day of payment for a year for his money or other thing due for the ſaid wares or merchandizes, or other thing, above 10l.; nor ſhould ſell, bargain, or mortgage any lands upon any higher intereſt: and thoſe who tranſgreſſed in any of theſe points, were to forfeit treble the value of the thing bargained for, and ſuffer fine and impriſonment at the king's pleaſure. The proviſions of this act have undergone ſome qualifications by later ſtatutes[i].

IN ſpeaking of the adminiſtration of juſtice, we ſhall firſt mention certain new courts, which were erected by

[h] 20 Hen. III. c. 5. 3 Hen. III. c 5. 6. 11 Hen. VII. c. 8.

[i] Stat. 2 and 3 Ed. VI. c. 20. 13 El. c. 8. 31 El. c. 5, &c.

parliament:

parliament: ſome of theſe concerned criminal matters, and, therefore, will be more properly noticed hereafter; others, which were of a civil nature, may very properly be placed here: they all related to the better collection and management of the king's revenue.

THE diſſolution of religious houſes opened a new ſource of revenue to the crown; for the governance of which was erected by ſtat. 27 Hen. VIII. c. 27. *The Court of Augmentation of the Revenues of the Crown of England.* This was a court of record, with a ſeal; a perſon was to be appointed and called chancellor of the court of augmentations. There was beſide to be a treaſurer, attorney, ſolicitor, ſeveral auditors and receivors, with clerks, and other neceſſary retainers to a court. Another was eſtabliſhed by ſtat. 33 Hen. VIII. c. 39. called *The Court of General Surveyors of the King's Lands.* This was to be a court of record, and to have a ſeal. Several perſons were to be appointed and called the general ſurveyors of the king's lands; which ſeveral perſons were to conſtitute only one officer. The treaſurer of the king's chamber was always to be treaſurer of the revenues of this court, and was to rank next to the ſurveyors; the next officer was to be the king's attorney of this court; the next was maſter of the woods: then followed the ſeveral auditors and receivors: clerks were to be appointed, with other neceſſary appendages to a court. All ſuch lands, and no other, as were mentioned in a ſchedule, ſigned with the king's ſign-manual, were to be within the order and governance of this court. Henry afterwards, in the 38th year of his reign, diſſolved both theſe courts by letters patent; and by letters patent erected a new court of augmentation: both which acts of authority have been held contrary to law, and to require the confirmation of parliament to give them force, as was afterwards done by ſtat. 7 Ed. VI. c. 2. But the date of this re-eſtabliſhment was ſhort; for queen Mary, according to a power given her by ſtat. 1 Mar.

CHAP. XXVIII. HENRY VIII.

c. 10. did, by letters patent in that ſame year, diſſolve this court; and the next day, by other letters, *united the ſame* to the exchequer: which laſt ſtep was reſolved afterwards [k] by all the judges to be utterly void, as there remained after the diſſolution no court to be united [l]. Such was the fortune of theſe two courts.

By ſtat. 32 Hen. VIII. c. 45. a court of *the firſt fruits and tenths* was eſtabliſhed. This was a court of record, with a ſeal; the principal officer of which was to be called chancellor of the firſt-fruits and tenths. There was to be a treaſurer of the firſt-fruits and tenths; the third perſon in the court was to be the king's attorney of the firſt-fruits and tenths: there were to be auditors and clerks, meſſengers, and other retainers. This was diſſolved by ſtat. 1 Mar. ſeſſ. 2. c. 10. and the clergy exonerated from theſe payments by ſtat. 2 and 3 Ph. and Mar. c. 4.; and though the crown reſumed the firſt-fruits and tenths by ſtat. 1 El. c. 4. yet the court was not revived.

For the ſurvey and management of the valuable fruits of tenure, a court of record was erected by ſtat. 32 Hen. VIII. c. 46. called *The Court of the King's Wards*. To this was annexed by ſtat. 33 Hen. VIII. c. 22. *The Court of Liveries*; ſo that it then became *The Court of Wards and Liveries*. This, like other parts of the king's revenue, was before under the government of the exchequer.

This judicial eſtabliſhment had a longer continuance than the other novelties of this ſort projected by Henry and his parliament; it continued as long as the object of its judicial cogniſance had exiſtence, exerciſing this juriſdiction with great vigour till the abolition of tenures. An eſtabliſhment of ſuch importance deſerves, therefore, ſome more particular notice among the innovations in our juridical polity.

[k] Dyer, 4 El. 16.

[l] 4 Inſt. 122.

This

Court of wards and liveries erected.

THIS court, as appears by the preamble of the act for eſtabliſhing it, was not only for the management of wards properly ſo called, but alſo of idiots and fools natural in the king's cuſtody, and alſo for licences to be granted to the king's widows to marry, and fines to be made for marrying without his licence. For managing ſuch perſons and their property, a court of record, with a ſeal, was thereby erected, to be called *The Court of the King's Wards*. A chief officer was to be appointed by the king, to be called *maſter of the wards*, who was to keep the ſeal; then another, called the king's attorney of the wards, the king's receiver-general of the lands of the wards, and two others to be called auditors of the lands of the wards. All lands, and other hereditaments whatſoever, belonging to ſuch wards, were to be in the order, ſurvey, and governance of this court. The maſter of the wards was authorized to iſſue ſuch proceſs as was then in uſe in the king's Duchy chamber of Lancaſter, held at Weſtminſter, for any matter or debt touching or ariſing from ſuch property. He was to hold a court at the times of the four terms, and all proceſs from the court of exchequer upon this head was in future to be void. The authorities through the act are moſtly given to the maſter, with the advice of the attorney, receivor, and auditors: they had power to take recogniſances, and to commit to priſon. By ſtat. 33 Hen. VIII. c. 22. all tranſactions relating to the king's liveries were brought within the ſurvey of this court, and the maſter of the king's wards was thenceforth to be *the maſter of the king's wards and of the liveries*: a perſon was alſo appointed, to be called ſurveyor of the king's liveries, who was to take precedence next before the king's attorney of the wards.

THE ſtat. 33 Hen. VIII. c. 39. for erecting the court of ſurveyors of the king's lands, contains numerous proviſions applicable to all the beforementioned courts, and alſo to that of the Duchy, and court of exchequer: we

CHAP. XXVIII.

HENRY VIII.

ſhall take notice only of the following very general deſcription of their juriſdiction. It was ordained, that all manner of debts, detinues, treſpaſſes, accounts, reckonings, waſtes, deceipts, negligences, defaults, contempts, complaints, riots, quarrels, ſuits, ſtrifes, controverſies, forfeitures, offences, or other things, ariſing in, for, or upon any matter, cauſe, or thing, committed to the order and governance of any of theſe courts, wherein the king was only party; and alſo all manner of eſtates for term of years, between party and party, concerning the premiſes, were to be cogniſable in theſe courts reſpectively, with power to correct and puniſh all perſons convicted of any of the above offences. There was an exception out of the above general words, of all treaſons, murders, and felonies, of eſtates, rights, titles, and intereſts, as well of inheritance as of freehold, other than jointures for term of life. All ſuits, bills, plaints, informations, declarations, complaints, anſwers, replications, allegations, cauſes, matters, and iſſues, were to be purſued, made, and tried in ſuch ſeveral courts, by due examination of witneſſes, writing, proof, or by ſuch other ways or means as by the ſeveral courts ſhould be thought expedient [m].

SUCH was the extenſive authority given to theſe new tribunals, among which the court of wards and liveries was moſt diſtinguiſhed, from the intereſting nature of the ſubjects of cogniſance there, which involved the concerns of ſo many of the king's ſubjects, in an article of ſuch ſerious conſequence to them and their families.

SOME attention was paid by the parliament to the adminiſtration of juſtice; and ſeveral acts were paſſed, in order to remove obſtacles, and expedite the proceedings and proceſs of courts. Proceſs of outlawry was allowed by ſtat. 23 Hen. VIII. c. 14. in actions on ſtat. 5 Rich. II. of forcible entries; and the proceſs of debt allowed in actions of

[m] Sect. 57. 59.

covenant

covenant and annuity. By ch. 15. of the ſame ſtatute, coſts were given to defendants, upon nonſuit or verdict, with the ſame proceſs and execution for recovery thereof as plaintiffs would have. This was in the following actions: on the ſtatute of forcible entries, 5 Rich. II. in debt or covenant upon any ſpecialty or contract, detinue of goods, in accompt, treſpaſs on the caſe, and action upon a ſtatute for a wrong to the plaintiff. There was a proviſo added, that plaintiffs ſuing *in formâ pauperis* ſhould not, hereby, be made liable to pay coſts, but ſhould, inſtead thereof, ſuffer ſome puniſhment at the diſcretion of the juſtices; and this puniſhment, we are informed, was uſually whipping [n]. Again, it was provided, by ſtat. 24 Hen. VIII. c. 8. that this act ſhould not give coſts againſt any plaintiff ſuing to the uſe of the king. By ſtat. 21 Hen. VIII. c. 19. coſts and damages are given to an avowant in replevin or ſecond deliverance, if the plaintiff was nonſuit, or otherwiſe barred, in the ſame manner as the plaintiff would have recovered them. Where lands delivered in execution were evicted, a remedy by *ſcire facias* againſt the party or his executor is given by ſtat. 32 Hen. VIII. c. 5. to have the part of the debt unſatisfied, out of other lands belonging to him.

Proclamations on exigents.

PROVISION was made by ſtat. 4 Hen. VIII. c. 4. for proclamations on exigents in foreign counties, which act was perpetuated by ſtat. 6 Hen. VIII. c. 4. It was thereby directed, that where in any action perſonal a defendant was deſcribed of one county, and an exigent was awarded into another, it ſhould be lawful for the juſtices to award a writ of proclamation to the ſheriff of the county of which the defendant was deſcribed; or if the king's writ runneth not there, then to the adjoining county. The proclamation was to contain the effect of the action, and to direct the ſheriff to make three proclamations within

[n] Salk. 506.

his

CHAP. XXVIII.

HENRY VIII.

his county at three different days, two in full county-court, the third at the general ſeſſions, requiring him to yield himſelf to the ſheriff of the foreign county into which the exigent was awarded. Such proclamation was to have the ſame return as the exigent, and to be made out by the ſame officer. Any outlawry promulged in a foreign county, without award of ſuch writ of proclamation, was declared void.

Jurors.

SEVERAL regulations were made reſpecting jurors, as well to ſecure a regular appearance of them at the trial, as to guard againſt or to puniſh perjury and miſbehaviour. Two of theſe parliamentary proviſions were confined to jurors in London. In the former reign [o], it had been endeavoured to enforce appearance by larger iſſues: there being ſome doubt, how theſe were to be levied, it was now directed [p], that the mayor might diſtrain for them. This was confined to actions in the city courts. By the laſt it was ordained, to prevent delays for want of jurors, that in all city actions depending in the courts at Weſtminſter, the ſheriffs might ſummon perſons having goods to the value of 100 marks, as well as thoſe having lands or tenements of forty ſhillings value annually. It further directs, what iſſues ſhould be returned on the firſt and ſecond diſtreſs, and all the ſubſequent ones [q].

A MORE general proviſion was made by ſtat. 35 Hen. VIII. c. 6. to effect a due appearance of jurors at *niſi prius*. It was ordained, that where the jurors, upon an iſſue joined, in a court at Weſtminſter, were to have forty ſhillings freehold, the *venire facias* ſhould ſpecify *quorum quilibet habeat quadraginta ſolidatas terræ, tenementi, vel redditus ad minus*; and the ſheriff was not to return perſons who were not ſo qualified. In caſes which did not require that clauſe, he was not to return any that

[o] Vid. ant. 143.
[p] Stat. 4 Hen. VIII. c. 3.
[q] Vid. alſo ſtat. 5 Hen. VIII. c. 5.

had

had not ſome freehold; and in both caſes, he was to return ſix ſufficient hundredors, at leaſt, if there were ſo many within the hundred. Upon every firſt *habeas corpora*, or *diſtringas*, with a *niſi prius*, the ſheriff was to return at leaſt five ſhillings; at the ſecond, ten ſhillings; at the third, thirteen ſhillings and fourpence; and upon every ſubſequent one he was to double the iſſues, till a full jury was ſworn, or the proceſs otherwiſe determined. If a full jury ſhould not appear, or after challenges there was likely to be a default of jurors, the juſtice, at requeſt of the plaintiff or defendant, might command the ſheriff to name and appoint as many perſons of the ſame county, then preſent at the aſſiſes or *niſi prius*, as would make up a full jury, who ſhould be added to the pannel, and their names annexed to it: theſe were to be liable to challenge, as if they had been impannelled on the *venire facias*; and if they made default, they might be fined as jurors at common law. The jurors firſt impannelled were nevertheleſs to loſe their iſſues, the ſame as if the jury had remained for default of jurors, unleſs they were excuſed upon any reaſonable cauſe by the juſtice; in like manner, if the jury was not taken by reaſon of the not coming of the juſtices. The ſubſidiary jurors added, according to the directions of this act, conſtituted what were called *tales de circumſtantibus*, and they were mentioned under that appellation, in ſtat. 37 Hen. VIII. c. 22. made for continuing this act, which was only temporary.

Attaint.

Now we are upon the ſubject of jurors, we may introduce a ſtatute made for altering the proceedings in attaint. We have obſerved, in the laſt reign, that the parliament had provided a new way of puniſhing jurors, and had foregone the antient villainous judgment in attaint[r].

[r] Vid. ant. 143.

That

CHAP. XXVIII.

HENRY VIII.

That ſtatute was only experimental; and therefore, after being continued by one at the beginning of this reign, was ſuffered to expire in the third year of this king[s]. Attaints, therefore, again returned to their antient courſe, till ſtat. 23 Hen. VIII. c. 3. which renewed the policy of the act of the laſt reign, in the following manner: In every caſe of an untrue verdict, between party and party, in any ſuit, plaint, or demand, before judges of record, where the thing in demand was worth forty pounds, and did not concern a man's life, the party grieved might have an attaint againſt the jurors and the party; with ſummons, reſummons, and diſtreſs infinite againſt them, and alſo the grand jury. Every one of the grand jury was to have freehold of the yearly value of forty ſhillings. The diſtreſs againſt the grand jurors was to be awarded, and open proclamation was to be made, and this was to be fifteen days before the return of the diſtreſs. If the party or any of the petit jurors made default, the grand jury was to be taken againſt every one ſo making default. Thoſe who appeared, were to have no anſwer to the plaintiff, except *that they made true ſerement* (provided they were the ſame perſons; and the writ, proceſs, return, and aſſignment, were good and lawful), and the party was to plead that *they gave a true verdict*; and if they pleaded in bar, the grand jury was ſtill to go on to enquire whether the firſt jury gave a true verdict. If the jury were convicted, each of them was to forfeit twenty pounds, half to the king, and half to the party grieved; they were alſo to be fined at the diſcretion of the juſtices, and their oath never more accepted in any court: the party's plea being alſo found againſt him, the plaintiff was to be reſtored to what he had loſt, with reaſonable coſts and damages. It was ordained, that outlawry or excommu-

[s] Stat. 1 Hen. VIII. c. 24.

nication

nication of the plaintiff ſhould be a void plea, not to be anſwered. In proceſs of attaint, day was to be given as in a writ of dower, and no eſſoin or protection to be allowed. An attaint was not to abate for the death of the party, or any of the jury.

If the verdict was for a perſonal thing, as debt, treſpaſs, or the like, under forty pounds, there was to be the ſame proceſs and pleas, and delays were in the ſame manner to be removed: only the qualifications of the grand jury need not exceed five marks yearly of freehold, or the property of one hundred marks of goods and chattels; and the petit jurors, if attainted, were to forfeit only five pounds, and alſo make fine and ranſom.

In either caſe, if there were not ſufficient qualified jurors, a *tales* might be awarded into the next county. The remedy of this ſtatute was alſo extended to perſons grieved by any untrue verdict of inheritance in deſcent, or of freehold or inheritance in reverſion or remainder. If the plaintiff was nonſuit, or diſcontinued, he was to make fine by the diſcretion of the juſtices. All attaints were thenceforward to be taken in the king's bench or common-pleas, and in no other court; and *niſi prius* might be granted by the juſtices upon the diſtreſs: every petit juror might appear by attorney.

There is a proviſo, declaring, that this ſtatute ſhall not prejudice the act of the laſt reign [t], reſpecting attaints in the city; but that attaints might be either brought there in the huſtings, or under this act. To obviate ſome infringement which it was apprehended the city-privileges might undergo by the general form of this act, it was in a ſubſequent ſtatute declared [u], that in attaints for verdicts given by citizens, the jurors need no qualification of freehold, but only to have 400 marks in value of goods

[t] Stat. 11 Hen. VII. c. 21. Vid. ant. 143. [u] Stat. 37 Hen. VIII. c. 5.

and

CHAP. XXVIII.

HENRY VIII.

and chattels; and, further, that the juſtices ſhould ſit at Guildhall, or elſewhere, in the city to try ſuch attaints [x].

SUCH was the new form into which this antient proceeding for puniſhing the perjury of jurors was now thrown: it has been treated very fully in the early parts of our hiſtory; and when it underwent ſo important a revolution, it ſeemed proper that ſuch changes ſhould be recounted equally at large.

Statute of jeofail.

THE attaining of ſubſtantial juſtice was promoted by a new ſtatute of amendment and jeofail: this was ſtat. 32 Hen. VIII. c. 30. which took away ſome of the minute cauſes of exception to which records and proceedings were before liable. It ordains, that after verdict judgment ſhall be given, notwithſtanding any miſpleading, lack of colour, inſufficient pleading, or jeofail, any miſcontinuance, diſcontinuance, or miſconveying of proceſs, misjoining of the iſſue, lack of warrant of attorney of him againſt whom the verdict is, or any other default, or negligence of any of the parties, their counſellors, or attornies; nor ſhall any writ of error, or of falſe judgment, be maintainable on account of any of the defects abovementioned. By the ſame ſtatute, attornies are required to deliver their warrants of attorney to be entered of record, the ſame term the iſſue is entered, under penalty of 10l. and impriſonment at the diſcretion of the court. After this act, much room was ſtill left for the parliament to interpoſe on the ſame ſubject, as has been ſince done by many ſtatutes of greater extent than the preſent.

WHILE theſe proviſions were made to prevent the failure of actions on account of trifling defects in the proceedings, the antient ſtrictneſs was ſtill preſerved in criminal proſecutions: in theſe it was thought not inconvenient

[x] It appears from the preamble of this ſtatute, that the city privilege about trials run thus: That inquiſitions of the citizens of London ſhould be taken at St. Martin's le Grand, or at the Guildhall of the city of London, and not elſewhere, except inquiſitions before the juſtices in eyre, at the tower of London, and for the delivery of the gaol of Newgate.

to

to allow any exception which could, upon any fair pretence, be taken in favour of the life or liberty of a defendant, after conviction. But the ſtat. 37 Hen. VIII. c. 8. ordained, that, for the future, the words *vi et armis, videlicet, cum baculis, cultellis, arcubus, et ſagittis,* or any of the ſame or like words, if omitted in an indictment or inquiſition, ſhall not be a cauſe to avoid ſuch indictment or inquiſition, by writ of error, plea, or otherwiſe. A doubt has been raiſed on the conſtruction of this ſtatute; whether it was meant to extend to all the words there recited, or only to thoſe which come under the *videlicet*. This has prevented the full benefit that otherwiſe might have been derived from this only ſtatute of jeofail which relates to criminal proceedings.

As the end of all laws is the quiet and peace of ſociety, the limiting a period of time within which perſons muſt purſue their remedy by action, was a wiſe and politic conſtitution. Some ſtatutes were made for the limitation of actions [y]. The cruel proceedings upon penal ſtatutes in the laſt reign, made it neceſſary to fix ſome bounds to common informers. By ſtat. 1 Hen. VIII. c. 4. actions on penal ſtatutes were to be brought by the king within three years, and by any common perſon within one. This act being temporary, was continued by ſtat. 7 Hen. VIII. c. 3.

Statute of limitation.

A MORE general proviſion was made for limitations in ſeveral real writs, by ſtat. 32 Hen. VIII. c. 2. which ſtates in the preamble, two inconveniencies from the preſent length of limitation: one is, that it was above the remembrance of any man to try and know the certainty of the point in iſſue; and that perſons, though they and their anceſtors had been in long poſſeſſion, could not enjoy their eſtates in ſafety. To remedy this, the following alterations were made: That no perſon ſhould ſue a writ of right, or make preſcription, title, or claim, alledging the ſeiſin of his anceſtor, any otherwiſe than

[y] Vid. ant. vol. II. 124.

within

CHAP. XXVIII.

HENRY VIII.

within threeſcore years before the *teſte* of the writ, or before the preſcription, title, or claim made: That no perſon ſhould maintain an aſſiſe of mortaunceſtor, coſinage, aiel, writ of entry upon diſſeiſin done to an anceſtor, or, any other action poſſeſſory of any further ſeiſin of himſelf or his anceſtor, but within fifty years before the *teſte* of the writ; nor of his own ſeiſin, above thirty years before the *teſte* of the writ; nor ſhould avow or make cogniſance for any writ, ſuit, or ſervice, alledging a ſeiſin thereof in himſelf, his anceſtor, or any one whoſe eſtate he had, above fifty years next before the making of the avowry or cogniſance. All formedons in reverter and remainder and every *ſcire facias* on a fine, was to be ſued, uſed, and taken, within fifty years after the title and cauſe of action accrued; and if a writ was brought, preſcription, title, claim, avowry, or cogniſance, was made any otherwiſe, and was traverſed, and found againſt the perſon ſo doing, he was to be barred for ever.

Trinity term altered.

AMONG the proviſions relating to the adminiſtration of juſtice, we muſt not forget one for bringing Trinity term more forward in the year. This was ſtat. 32 Hen. VIII. c. 21. which ſtates two reaſons for ſuch a change: firſt, that in this ſeaſon there had often happened the plague and other ſickneſſes; ſecondly, that it was a great impediment to poor people who ought to be employed about their harveſt. It was therefore thought proper to take off the two laſt returns, and, inſtead, to add one to the beginning of the term [z]. For this purpoſe it was enacted, that this term ſhould have only four common returns; the firſt of which was to be *in craſtino Sanctæ Trinitatis*; the ſecond, *in octabis Sanctæ Trinitatis*; the third, *in quindenâ Sanctæ Trinitatis*, as before; but the fourth was to be *a die Sanctæ Trinitatis in tres ſeptimanas*, which was to take its commencement from Trinity Sunday into three weeks next

[z] See the Diagram exhibiting the returns as they were laſt adjuſted by the ſtat. *Dies communes in Banco*, 52 Hen. III. ant. vol. II. 58.

follow-

following, and was to have its return with the fourth day next following, as was uſual in the other returns; and the returns *in craſtino Sancti Johannis Baptiſtæ*, *in octabis Sancti Johannis Baptiſtæ*, and *in quindenâ Sancti Johannis Baptiſtæ*, were thenceforward to be aboliſhed. It was ordained, that this term ſhould begin the Monday next after Trinity Sunday [a], for the keeping of eſſoins, profers, returns, and the other uſual ceremonies; and that the full term ſhould commence on Friday next after *Corpus Chriſti* day. When this alteration was made, another was alſo neceſſary for adjuſting the relation the term, after this modification, was to bear with the others. In the old ſcale, ſettled by the ſtat. *Dies communes in Banco*, all writs iſſued in Hilary term, and thoſe of no other, were returnable on ſome of the returns in Trinity term; and all thoſe iſſued in Trinity, fell upon ſome return in Michaelmas: this relation was ſtill preſerved, but it was ordered in this way. If any writ, in a real action, was returnable *in octabis Hilarii*, then day was to be given *in craſtino Sanctæ Trinitatis*; if *in quindenâ Sancti Hilarii*, *in octabis Sanctæ Trinitatis*; if *in craſtino Purificationis Beatæ Mariæ*, *in quindenâ Sanctæ Trinitatis*; if *in octabis Purificationis Beatæ Mariæ*, then *a die Trinitatis in tres ſeptimanas*. Again, if *in craſtino Sanctæ Trinitatis*, *in craſtino Animarum*; if *in octabis Sanctæ Trinitatis*, *in craſtino Sancti Martini*; if *in quindenâ Sanctæ Trinitatis*, *in octabis Sancti Martini*; if *a die Trinitatis in tres ſeptimanas*, then *in quindenâ Sancti Martini*.

PROVISION was likewiſe made, as in the reign of Henry III. to adapt this alteration to the return of writs of dower. If a writ of dower was returnable *in quindenâ Paſchæ*, day was to be given *in craſtino Sanctæ Trinita-*

[a] The Monday after Trinity Sunday in this year 1786, is the 12th of June, and *Corpus Chriſti* being Thurſday 15th, the full term begins Friday 16th of June. The new return *in tres ſeptimanas a die Sanctæ Trinitatis* will fall on the third of July.

tis;

CHAP. XXVIII.

HENRY VIII.

tis; if *a die Paſchæ in tres ſeptimanas, in octabis Sanctæ Trinitatis*; if *a die Paſchæ in unum menſem, in quindenâ Sanctæ Trinitatis*; if *a die Paſchæ in quinq; ſeptimanas*, or *in craſtino Aſcenſionis*, then *a die ſanctæ Trinitatis in tres ſeptimanas*. Again, if *in craſtino Sanctæ Trinitatis*, then *in octabis Sancti Michaelis*; if *in octabis Sanctæ Trinitatis, in quindenâ Sancti Michaelis*; if *in quindenâ Sanctæ Trinitatis, a die Sancti Michaelis in tres ſeptimanas*; if *a die Sanctæ Trinitatis in tres ſeptimanas*, then *a die Sancti Michaelis in unum menſem*, or otherwiſe, ſays the act, as it is appointed by the ſtatute of Marlbridge. Thus far of real writs. It was ordained, further, that all common writs and proceſſes, as well perſonal as mixed, returnable in Trinity term, ſhould be returnable on ſome of the four returns directed by this act. The juſtices, however, in ſuch and the like caſes and proceſſes, where ſpecial days had been uſed to be appointed for the return of writs and proceſſes, were authorized to continue to appoint ſpecial days as it ſeemed convenient to them. The days appointed to be given in *quare impedit* by the ſtatute of Marlbridge, and in attaint by ſtat. 5 Ed. III. c. 7. as far as they were not contrary to this act, were ſtill to continue.

CHAP.

CHAP. XXIX.

HENRY VIII.

Many new Treaſons created—Treaſon by writing or ſpeaking—To diſobey the King's Proclamations—Statute of the Six Articles—Puniſhment of Poiſoning—Of Larceny—Servants embezzling Goods—Larceny in a Houſe—Law againſt Gypſies—Cheating by falſe Tokens—Gaming—Trial of Treaſon committed in Wales—and committed out of the Realm—Trial of Piracy—Trial of Bloodſhed in the Palace—The Benefit of Clergy taken away—The Queſtion of Clergy debated before the Council—The King's Determination—Abjuration and Sanctuary—Clergy again taken from certain Offenders—Sanctuary taken from certain Offenders.

CHAP. XXIX. HENRY VIII.

THE law of crimes and puniſhments began to aſſume a very different appearance. An alteration in circumſtances, and an alteration in ſentiments, induced the parliament to give a keener edge to the law, in many caſes. To ſuffer ſuch offences as murder and robbery, larceny, burning, and other crimes, to enjoy impunity, through a peculiarity in legal notions, or defects in the courſe of juſtice, was thought too inconſiſtent with the good order and peace of ſociety to be any longer endured. Many ſtatutes were made for the due puniſhment of ſuch enormities. Beſides this modifying of common-law offences, the character of the times, and that of the prince upon the throne, contributed to the enacting of many new crimes, with new methods of trial and puniſhment; all which, together, exhibit a greater ſhew of novelty than had been introduced

CHAP. XXIX.

HENRY VIII.

introduced in our criminal law in any of the preceding reigns.

THE penal ſtatutes of this reign may be naturally divided into ſuch as concern religion, and the king's perſon and government; thoſe which regard inferior offences; and ſuch as make any change in the mode of trial at common law, or in any other way affect the puniſhment of offenders; and, laſtly, thoſe that reſpect the benefit of clergy and ſanctuary.

Many new treaſons created.

THE penal acts relating to the king's perſon and government, and to the alteration made in religion, conſtitute the firſt head of enquiry: theſe were all repealed by ſtat. 1 Ed. VI. c. 12. and not one of them has any influence on the body of our law in force at this day. Notwithſtanding this, they are extremely worthy of obſervation, when conſidered in an hiſtorical light. Theſe laws were intirely of a new impreſſion, totally differing from any that had gone before, both in the deſcription of crimes, and the ſeverity with which they puniſhed them. In theſe ſtatutes treaſon and miſpriſion of treaſon were made the conſequence of every action and every word that tended to affect the regal dignity; the obedience of men was ſecured by oaths, and the diſcovery of guilt facilitated by methods unheard of in the common law. Though theſe ſtatutes were all abrogated, yet the offences therein created were revived in the ſubſequent reigns, with inferior penalties; and many of their regulations were followed in ſimilar circumſtances: ſo that theſe laws gave riſe to a new ſpecies of criminal juriſprudence, which has been adopted occaſionally ever ſince; tempered, however, with greater ſhew of moderation. For theſe reaſons, as well as to diſplay their peculiar ſtile and extravagance, we ſhall treat them fully, and that nearly in the order in which they were made.

IT was not till the 25th year of his reign, that Henry had involved himſelf in meaſures which forced him to ſuch acts of violence, as marked his government for ſanguinary

ſanguinary and tyrannical. Having parted with his queen *Catharine*, embroiled himſelf with the Emperor and the Pope, and taken the reſolution of throwing off the papal yoke, he found himſelf under a neceſſity of ſecuring what he had done by an act of parliament, which was to confirm the divorce, and the marriage with *Anne Boleyne*, and to ſettle *the ſucceſſion* of the crown upon the iſſue of that marriage. Stat. 25 Hen. VIII. c. 22. was paſſed for this purpoſe. After giving the ſanction of parliament to the ſteps which had been lately taken by the king reſpecting his two queens, it enacted, that if any perſon by writing, or imprinting, or by any exterior act or deed, maliciouſly procured, or did any thing to the peril of the king's perſon; or gave occaſion, by writing, print, deed, or act, whereby the king might be diſturbed of the crown; or by writing, print, deed, or act, procured, or did any thing to the prejudice, ſlander, or derogation of queen Anne or her iſſue by the king, ſo as to interrupt their title to the crown, as limited by that act, ſuch offence ſhould be high-treaſon. And if any perſon, *by words only*, ſhould publiſh or utter any thing to the peril of the king, or ſlander of the marriage with queen Anne, or to the ſlander or diſheriſon of the iſſue of that marriage, it was made miſpriſion of treaſon. All perſons of full age were to take an oath to fulfil and maintain the objects of that act; and thoſe who refuſed to take ſuch oath, when required, were to be held guilty of miſpriſion of treaſon; the preciſe form of which oath was afterwards preſcribed by ſtat. 26 Hen. VIII. c. 2.

Treaſon by writing or ſpeaking.

When the way was once pointed out of ſurrounding the king's perſon and dignity with new-made treaſons, and of binding people to their duty and allegiance by expreſs and formal oaths, we ſhall preſently ſee how ready the parliament was, on every occaſion, to fabricate and alter, as circumſtances changed, theſe freſh devices for the ſecurity of government and religion.

CHAP. XXIX.

HENRY VIII.

In the very next year an act was paſſed, in order to reſtrain "all manner of ſhameful ſlanders and dangers "which might happen to the king's perſon, or that of the "queen." It was by ſtat. 26 Hen. VIII. c. 13. made *high-treaſon*, if any one did maliciouſly *wiſh*, *will*, or *deſire by words*, or writing, or by craft imagine, invent, practiſe, or attempt any bodily harm to the perſon of the king, queen, or of their heir apparent, to deprive them of their dignity, title, or name; or if any did ſlanderouſly and maliciouſly publiſh and pronounce, by expreſs writing or words, that the king was heretic, ſchiſmatic, tyrant, infidel, or uſurper (which latter words were intended to bridle the inſolence of ſome friars); or if any with-held from the king his caſtles, fortreſſes, or holds, or rebelliouſly detained any of his ſhips, ordnance, artillery, or munition, and did not deliver them up within ſix days after proclamation. This act, beſides taking away ſanctuary in caſes of high-treaſon, increaſed the forfeiture upon attainder, by declaring, that all lands, tenements, and hereditaments, *of any eſtate of inheritance*, in uſe or poſſeſſion, ſhould be forfeited; which words included eſtates tail.

By the laſt act, we find that not only *exterior acts and deeds* (as the preceding ſtatute expreſſed it), and writing, but *words* expreſſive of a *wiſh* were made treaſon. We ſhall ſoon ſee that the legiſlature laid the ſame penalty upon the *thoughts* or *belief* of men[a], if expreſſed by words. After ſtat. 27 Hen. VIII. c. 2. which made it treaſon to counterfeit the king's ſign-manual, privy-ſignet, or privy-ſeal, there follows ſtat. 28 Hen. VIII. c. 7. made for *the ſucceſſion of the crown*, after the death of *Anne Boleyne*, and the king's marriage to his queen *Jane*. The former act of ſucceſſion was thereby repealed; and now, ſimilar proviſions were made in favour of the iſſue and ſucceſſion by this new marriage. The king being empowered, in de-

[a] Stat. 28 Hen. VIII. c. 7, 21.

fault

fault of iſſue, to appoint a ſucceſſor, by letters patent or by will, it was made high treaſon to interrupt the ſucceſſion of the iſſue, or of the perſons ſo appointed by the king [b]. It was made high-treaſon to procure or do any thing, by words, writing, print, or deed, *for the repeal* or avoidance of that act; and the ſlander of the queen and her iſſue, or the doing any thing to the peril of the king's perſon, was made high-treaſon, in the very terms of the former act of ſucceſſion. It was moreover made high-treaſon, if any one by words, writing, imprinting, or any other exterior act, directly or indirectly, accepted, took, *judged*, or *believed*, the marriages with queen *Catherine* and *Anne* to have been good and lawful; or ſlandered the ſentences of the archbiſhop therein; or took, accepted, named, or called any of their children legitimate; or craftily imagined, invented, or attempted, by colour of any pretence, to deprive the king, queen, or their heirs, or thoſe the king ſhould appoint, of any of their titles, ſtyles, or regal power.

But the moſt ſingular part of this act was the following clauſe, which enacted, that if any, being required, by commiſſioners properly authorized, to make oath to anſwer ſuch queſtions as ſhould be objected to him upon any clauſe, article, ſentence, or word in that act, *did* contemptuouſly *refuſe to make ſuch oath*, *or*, after making it, *refuſed to anſwer*, he ſhould be guilty of high-treaſon: a ſpecies of examination unknown to the ancient common law of the country. The act even goes further, and ſays, that "if any proteſted, that they were not "bound to declare their thought and conſcience, and ſtiffly "thereon abided," it ſhould be high-treaſon; ſo little aſhamed were the makers of this act to be confronted with the miſchiefs that would naturally enſue from it; and ſo ready were they to undertake the cruel taſk of obviating

[b] Sect. 18, 19, 20.

CHAP. XXIX.

HENRY VIII.

the conſequences of former ſeverities by impoſing new ones. This act contained one more treaſon; which was, in caſe any one refuſed to take the oath preſcribed for the obſervance of it; the former oath of a ſimilar import being repealed and diſpenſed with [c]. The matter of this act was ſo various, and of ſuch a peculiar kind, and the manner in which it might be enforced ſo inſidious, that it became an engine in the hands of government, by which they might catch any man whom they wiſhed to deſtroy. This act is a ſtrong inſtance how abſolute Henry had become, when the parliament conferred on him the power to diſpoſe of the ſucceſſion to the crown.

THIS was followed by an act [d] to extinguiſh the authority of the biſhop of Rome. There is a long preamble, ſtating the uſurpations of the Pope in ſpirituals and temporals; and that, notwithſtanding the laws which had lately been made, "divers ſeditious and contentious perſons, "being imps of the ſaid biſhop of Rome, do, in corners "and elſewhere, whiſper, inculke, preach, and perſuade, "and from time to time inſtill into poor and unlettered "people the advancement and continuance of the ſaid "biſhop's feigned and pretended authority." For theſe reaſons it was enacted, that if any one by writing, cyphering, printing, preaching, or teaching, deed or act, obſtinately or maliciouſly held or ſtood with, to extol, ſet forth, maintain, or defend, the authority of the biſhop of Rome, or invented any thing for the advancement of it, he ſhould incur the penalties of ſtat. 16 Rich. II. c. 5. that is, a *præmunire* [e]; being a proceſs originally contrived for repreſſing the incroachments of papal power. To engage all perſons in an expreſs obligation to ſupport the king againſt the Pope, an oath was framed, by which the taker renounced the pope and all his authority and juriſdiction; and this oath was to be taken by all officers and miniſters

[c] Sect. 24, 25. [d] Stat. 28 Hen. VIII. c. 10. [e] Vid. ant. vol. III. 166.

ſpiritual

ſpiritual and lay; every religious perſon; all thoſe who took orders, or any degree in the univerſity; and it was made high-treaſon to refuſe this oath when it was required to be taken: ſo that all hopes of reconciliation with the church of Rome ſeemed cut off by this ſtatute.

THAT the king's power to diſpoſe of the crown might not be thwarted or interrupted by the marriage of any of his family againſt his will, it was, by ſtat. 28 Hen. VIII. c. 18. made high-treaſon, both in the man and woman, if any one eſpouſed, married, or took to wife any of the king's children, being lawfully born, or otherwiſe commonly reputed for his children; or any of the king's ſiſters, or aunts on the part of the father; or any of the lawful children of the king's brethren or ſiſters, or even to contract marriage with them, without the king's licence under the great ſeal; or to deflower any of them, being unmarried. Theſe were the penal laws made in this ſhort parliament, in the 28th year of the king.

To diſobey the king's proclamations.

THE next treaſon that was made, was to enforce obedience to the king's proclamations. The late proceedings of the king about the Articles of Religion, and other injunctions which had been publiſhed by his ſole authority, had been excepted againſt as contrary to law; becauſe the king had, without conſent of parliament, altered ſome laws, and laid taxes on his ſpiritual ſubjects[f]. This occaſioned the famous ſtatute 31 Hen. VIII. c. 8. The preamble of this act ſets forth "the contempt and diſobe-"dience of the king's proclamations by ſome who did not "conſider *what a king by his royal power might do*; which, "if it continued, would tend to the diſobedience of the "laws of God, and the diſhonour of the king's majeſty, "who may full ill bear it. Conſidering alſo that many oc-"caſions might require ſpeedy remedies, and that de-"laying theſe till a parliament met, might occaſion great

[f] Burn. Ref. vol. I. 251.

"preju-

CHAP. XXIX. HENRY VIII.

"prejudices to the realm; and that the king, by his royal "power *given of God, might do many things* in such "cases;" it was therefore enacted, that the king for the time being, with advice of his council, might set forth proclamations, with pains and penalties in them, which were to be obeyed as if they were made by an act of parliament. This, however, was not to go so far as that any one should suffer in his estate, liberty, or person, by virtue thereof; nor that by any of the king's proclamations, the laws or customs of the realm should be subverted. The statute directs the method in which these proclamations were to be issued, and how those should be punished who disobeyed them; and then adds, that if any offended against them, and, in further contempt, went out of the kingdom, it should be high-treason. The same power of issuing proclamations was given to the counsellors of the king's successor while under age, with the like penalties for disobeying them; a power of which the Protector, in the next reign, availed himself, in order to bring about the changes in religion [g].

Statute of the six articles.

In the same parliament was passed the famous act of the six articles, stiled, "An Act *for abolishing Diversity of Opinions*," by which the parliament enacted six of the strongest points in the Romish religion, under the severest penalties. The preamble says, that "the king hoped "that a full and perfect resolution of the said articles should "make *a perfect concord and unity amongst all his sub-* "*jects*." The ready way to effect this, it was thought, would be, to establish them by law, since the convocation of bishops and learned men had agreed upon them as settled orthodox doctrine. It was therefore enacted, by stat. 31 Hen. VIII. c. 14. *first*, that if any one by word, writing, printing, cyphering, or any otherwise, did teach, preach, dispute, or hold opinion against the real presence,

[g] Burn. Ref. vol. I. 252.

he

he ſhould ſuffer death as a heretic by burning, and forfeit as in caſe of high-treaſon; *ſecondly*, that if any one preached in any ſermon, or collection openly made, or taught in any common ſchool or congregation, or obſtinately affirmed or defended that the communion in both kinds was neceſſary; or *thirdly*, that prieſts might marry; or *fourthly*, that vows of chaſtity might be broken; or *fifthly*, that private maſſes ſhould not be uſed; or *ſixthly*, that auricular confeſſion was not expedient; it ſhould be adjudged felony. To theſe it was added, that if any prieſt, or any other who had vowed chaſtity, did marry, or contract matrimony; or if any prieſt who was or ſhould be married, did carnally uſe his wife, or any woman to whom he was contracted, or *was openly converſant or familiar with*, both the man and the woman ſhould be guilty of felony. This ſevere branch againſt unchaſte practices was not reliſhed by the popiſh clergy, and is ſaid to have been put in by *Cromwell*, to make this bloody law cut with two edges. If that was the deſign, the clergy got relieved from this well-intended ſtroke the next year; when, by ſtat. 32 Hen. VIII. c. 10. this latter part of the law was changed from felony to forfeiture and impriſonment.

After this act of the ſix articles, there was another brought in by *Cranmer*, which was intended to mitigate the late laws about religion. In this meaſure the king very readily concurred, being then engaged in a war, and wiſhing every thing to remain quiet at home. This was ſtat. 34, 35 Hen. VIII. c. 1. intitled, *An Act for the advancement of True Religion, and aboliſhment of the contrary.* One deſign of this proviſion was to put a ſtop to the uſe of *Tindal's* tranſlation, and to promote the reading the authoriſed tranſlation in Engliſh; after which it enacted, that if any ſpiritual perſon did preach, teach, defend, or maintain, any matter or thing contrary to the good inſtructions and determinations *that had or ſhould be ſet forth* by the king, he ſhould, for the firſt offence, recant; if he refuſed to recant, or offended a ſecond time, he

CHAP. XXIX.

HENRY VIII.

he was to abjure, and bear a faggot; which if he refuſed to do, or offended a third time, he was to be burnt as a heretic. But lay-perſons ſo offending were, for the third offence, or for refuſing to abjure, and bear a faggot, only to forfeit all their goods, and ſuffer perpetual impriſonment; ſo that the laity offending againſt the ſix articles and other popiſh doctrines, were intirely freed from the hazard of burning, and the ſpiritualty ſuffered only on the third conviction. They were alſo permitted to bring witneſſes in their defence[h].

The marriage between the king and *Anne of Cleves* being pronounced void, an act paſſed to confirm the ſentence; and it was now declared, as it had been on former occaſions of the ſame kind, that by word or deed to accept, take, judge, or believe, that marriage to be good, or to attempt to repeal that act, ſhould be high-treaſon. This was by ſtat. 32 Hen. VIII. c. 25. In the following year, another of this whimſical monarch's unfortunate queens gave occaſion to the penalty of high-treaſon being inflicted on tranſactions of a very nice and ſingular nature. Queen *Catharine Howard* was attainted by ſtat. 33 Hen. VIII. c. 21. of high-treaſon for incontinence; and it was enacted further, that if the king, or any of his ſucceſſors, ſhould marry a woman who was before incontinent, it ſhould be high-treaſon if ſhe concealed it; and any perſon knowing it, and not revealing it to the king, or one of his council, before the marriage, or within twenty days after, ſhould be adjudged guilty of high-treaſon. Further, if the queen, or wife of the prince, ſhould, by writing, meſſage, words, tokens, or otherwiſe, move any one to have carnal knowledge with them, or any others ſhould move either of them to that end, it ſhould be high-treaſon.

A *third act* was made for the *ſucceſſion* to the crown, which entirely overturned the former appointments: this was ſtat. 35 Hen. VIII. c. 1. There was a new oath,

[h] Burn. Ref. vol. I. 308.

deviſed

deviſed in place of that before ſworn, as well againſt the ſupremacy of the pope, as to maintain the ſucceſſion ordained by that act. It was made high-treaſon to refuſe that oath, or to do any thing contrary to this act, or to the peril and ſlander of the king's heir, as limited therein. The king's ſtile and title was ſettled by ſtat. 35 Hen. VIII. c. 3. in the following words: "Henry VIII. by the grace "of God, King of England, France and Ireland, Defen- "der of the Faith, and of the Church of England, and "alſo of Ireland, in earth the Supreme Head;" and it was declared high-treaſon to attempt to deprive him of it.

THIS variety of penal laws ſhews a want of temper in the legiſlature, which is hardly to be paralleled. The paſſions and caprice of the king ſeemed to be adopted by the parliament, which condeſcended to enforce by ſtatute every thing he could aſk or wiſh; ordaining for law the ſtrangeſt inventions that ever were thought worthy to become the objects of penal juriſprudence.

IT follows, that we ſhould now ſpeak of ſuch ſtatutes as were made reſpecting common offences: theſe, though not ſo numerous as the former, were of conſiderable importance, and are many of them in force at this day. The variation made in the crime of larceny by ſome that have already been mentioned, requires a more particular notice; after theſe, we ſhall proceed to other felonies; and, laſtly, to miſdemeanours: but firſt it will be proper to conſider two ſtatutes relating to homicide, which are the only two in this reign upon that head.

ONE of theſe ſtatutes was to remove a doubt concerning the killing a robber. We have ſeen, that in former times, a perſon killing a houſe-breaker went without puniſhment [1]. But now, the ſtatute 24 Hen. VIII. c. 5. ſays, there was "a queſtion and ambiguity," whether, when perſons attempted to commit robbery or murder, in or nigh the common highway, cart, horſe, or foot way;

[1] Vid. ant. vol. II.

or

CHAP. XXIX.

HENRY VIII.

or in a manſion houſe, meſſuage, or dwelling-place; or feloniouſly attempted to break a dwelling-houſe in the night-time, and were killed in ſuch attempt by the perſon they meant ſo to rob or murder, or by any perſon being in their dwelling-houſe, ſo attempted to be burglariouſly broken; whether the perſon killing was to forfeit his goods, as in chance-medley: to remove this doubt, the ſtatute declares, he ſhall not ſuffer any kind of forfeiture, but be as fully acquitted and diſcharged, as if he had been acquitted of the fact.

Puniſhment of poiſoning.

THE other ſtatute concerning homicide, is very remarkable; and as it enacted a new treaſon, it might perhaps have been ranked among that ſeries of acts. This is ſtat. 22 Hen. VIII. c. 9. It was occaſioned by one *Richard Rooſe*, a cook, having put ſome poiſon into a veſſel of yeaſt, in the biſhop of Rocheſter's kitchen, by means of which ſeventeen perſons of the biſhop's family, and ſeveral others, were poiſoned, and died. This very henious offence raiſed a kind of indignation in the legiſlature; and it was declared by that act, that the ſaid poiſoning ſhould be adjudged high-treaſon, that *Richard Rooſe* ſhould be attainted accordingly, by authority of parliament, and ſhould be boiled to death; and, as if none would commit this offence but ſuch as were of the ſame employment with the preſent offender, it was enacted, not only that thenceforth every wilful murder by means of poiſoning ſhould be high treaſon, but that ſuch offenders ſhould all be boiled to death

Of larceny.

IT became neceſſary that the crime of larceny ſhould be puniſhed in a ſeverer manner than it had been at common-law. The occaſions and temptations to commit this crime were much increaſed, ſince the improvements in arts and commerce had ſupplied the articles of perſonal property in greater number; and as thoſe were often coſtly, and made a part of dreſs, or of the furniture of houſes, there was need of additional penalties to guard them from violation. Beſides theſe conſiderations, a

dwelling-

dwelling-houſe, on all accounts, deſerved every protection the law could afford it. Stealing in this only place of ſecurity for a man's property, called for a more exemplary puniſhment; but more particularly when attended with violence of any kind. To theſe cauſes may be aſcribed the ſtatutes made in this and the ſubſequent reigns concerning larceny: what thoſe were we ſhall now enquire.

THE definition of larceny, after various changes, had, as we have ſeen in the reign of Edward IV [k]. become ſettled, in the following terms: *The felonious taking and carrying away of the perſonal goods of another.* In judging of offences, courts were tied up to this definition, and often found themſelves embarraſſed by a ſtrict conſtruction of it. To correct this, and to puniſh in a manner adequate to the crime, the aid of the legiſlature had ſometimes been called in, to enlarge the terms of this definition in particular inſtances. Thus it was made larceny to ſteal hawks, by a ſtatute of Edward III. and to ſteal records, by one of Henry VI. [l]; neither of which being *perſonals*, could be brought within the letter of the above definition.

THOSE two ſtatutes reſpected the *objects* of larceny. The ſtat. 21 Hen. VIII. applied to another part of this definition, and aſſiſted in aſcertaining, at leaſt in one inſtance, what ſhould be deemed a felonious *taking*. A breach of truſt, and embezzlement of effects confided to the cuſtody of a perſon, were thought not to be a *felonious taking and carrying away*. This kind of fraud had of late grown common, from the impunity it enjoyed; and many now thought, that, as it carried in it much of the miſchief, it deſerved the puniſhment annexed to felony. It was accordingly enacted, by ſtat. 21 Hen. VIII. c. 7. that if a ſervant, to whom caſkets, jewels, money, goods, or chattels, have been delivered to keep, withdraw himſelf,

Servants embezzling goods.

[k] Vid. ant. vol. III. 410. [l] Vid. ant. vol. II. 456. and vol. III. 279.

CHAP. XXIX.

HENRY VIII.

ſelf, and go away with the ſame, or any part thereof, with intent to ſteal, contrary to the truſt and confidence repoſed in him; or if, being in ſervice, without aſſent of his maſter he embezzle the ſame, with intent to ſteal or convert to his own uſe, to the value of forty ſhillings, it ſhall be felony. It is mentioned in the preamble of this act, as a doubt whether this kind of taking was larceny; a doubt raiſed, perhaps, by the caſe determined in 13 Ed. IV. [m] which we have before mentioned, and which is thought, and not improbably, to have given ſome occaſion for making this ſtatute.

THO' the inſtance of bailment there before the court was, or might be thought ſomething like this of truſt repoſed in ſervants, and was determined to be felony; yet the principles there laid down and agreed to, almoſt unanimouſly, led to an oppoſite concluſion; and there needed all the helps of diſtinctions and technical nicety to take even that caſe out of the general rule there laid down. Beſides, there is at the bottom of that report an opinion, which qualifies any inference which otherwiſe might be poſſibly drawn from it as to this point; for, admitting that a cook and a butler would be guilty of felony, if they converted the goods within their reſpective departments to their own uſe, it is there ſaid, that if the ſame things were bailed to a ſervant, *perhaps* [n], as they would be in his poſſeſſion, he could not commit felony of them [o]. About three years before it was ſaid by one of the judges, "If "one commits the care of his goods to his ſervant, the "ſervant cannot take them feloniouſly, becauſe they were "in his poſſeſſion" [p]. Theſe were direct authorities upon the point, and, joined with the reaſoning upon *bailment* and *poſſeſſion*, ſufficiently ſhew what were the opinions of lawyers in thoſe times reſpecting this queſtion.

[m] Vid. ant. vol. III. 410.
[n] *Per aventure.*
[o] 13 Ed. IV. 10.
[p] 10 Ed. IV. 14. Bro. Coro. 155. Vid. ant. vol. III. 410.

So

So ſtrictly have courts adhered to the notion of poſſeſſion, and its conſequences, that in 3 Hen. VII. the judges went ſo far as to agree with *Brian* (who, it may be obſerved, was one of the judges that diſſented from the opinion of felony in 13 Ed. IV. in the exchequer-chamber), that neither a ſhepherd nor a butler could commit larceny of their ſheep or plate, becauſe it could not be done *vi et armis*[r]; ſo much were the opinions changed from what they had been in the reign of Ed. IV. when theſe caſes were ſtated for felony, and allowed without debate. This doctrine we have ſeen was again diſcuſſed in the laſt reign; and it ſeemed, in the inſtance there ſtated, to be agreed upon ſo decidedly againſt the felony, as to call for a formal declaration of the law by ſtatute. Thus ſtood the law upon this ſubject towards the end of Henry VII.'s reign, and ſo we may ſuppoſe it was underſtood at the time this ſtatute was made. After all theſe authorities, we may be excuſed in differing from thoſe[s] who think that the point of law which is the ſubject of this ſtatute was ſo well ſettled before, that the doubt about it mentioned in the preamble, is one of thoſe which have much enervated the principles of the common law, and could not be the doubt of any lawyer.

Clergy was taken from this new felony by ſtat. 27 Hen. VIII. c. 17. which ſtatute was excepted in the general repealing law, ſtat. 1 Ed. VI. c. 12.; but becauſe the commencement of the ſeſſions was miſ-recited, it was held[t], that the ſaving was of no effect: ſo that ſtat. 27 Hen. VIII. c. 17. ſtood repealed, and ſtat. 21 Hen. VIII. c. 7. continued a clergyable felony, till the general repealing act of queen Mary, where, among other felonies, it was repealed: it was afterwards revived by ſtat. 5 Eliz. and is in force at this day.

Thus far the definition of larceny was extended in ſome particular caſes as to the *object* of it, and *the mode of*

[r] Bro. Coro. 137. [s] Barr. Stat. 478, 479. [t] Plowd. 399.

taking.

taking. There was another conſideration of this offence which deſerves notice; and that was, *the circumſtances* under which it might be committed.

Larceny in a houſe.

THE time or place where a theft was committed, made no part of the legal notion of it. Whether it was in a houſe, or from the perſon (unleſs from the perſon violently, and by putting in fear, for then it was robbery, a crime of a very different nature), the additional audacity of the offender conſtituted in law no additional degree of guilt: ſo the law had been for many centuries. The attendant circumſtances of aggravation under which this crime might be committed, drew the notice of the legiſlature now, for the firſt time. In this and the ſubſequent reigns many laws were made concerning *ſtealing in a houſe*, making all together a collection of ſtatutes ſo very ſimilar, as to render it difficult to diſtinguiſh the different aim and object of ſome of them.

THESE ſtatutes we ſhall hereafter notice among thoſe which took away clergy; but we muſt touch on them now, with a view of pointing ſome obſervations to the ſubject we are upon at preſent. The firſt of them is ſtat. 4 Hen. VIII. c. 2. which took away clergy from all felonies committed in a church, or hallowed place; from robbery or murder in the highway, or *in a houſe*, the owner, his wife, child, or ſervant, within, and put in fear. This new regulation being a temporary law, was ſuffered to expire; and theſe offenders were left once more to their former impunity; till ſtat. 23 Hen. VIII. c. 1. took away clergy from thoſe who *rob any perſon in his dwelling-houſe*, the owner, his wife, child, or ſervant, then being within, and put in fear. It takes away clergy alſo from thoſe who rob any church or chapel, or other holy place; from murder; robbery in or near the highway; from burning a dwelling-houſe, or barn with corn or grain; and from petit treaſon. This ſtatutes includes alſo acceſſaries before the fact.

THERE

THERE is something in the wording of this statute that is worthy of observation: it is the different construction which has been put on the same expression, when applied to different subjects; namely, *to rob*, when it is meant of a house, and when of a person. The words are, *if any rob any person in his dwelling-house*, &c. and *if any rob another in or near the highway*, &c.; the obvious and plain construction of which clauses, on the first view, should seem to be, that the locality of the offence *in* or *near* the *highway*, or *in a dwelling-house*, were the only circumstances particularly necessary to be defined.

BUT doubts arose, soon after the statute, whether the parliament had not something more in view than a mere robbery *from the person in a house*, and did not really intend by those words to signify the robbery *of a house*. To explain this doubt, and give this act the full effect which, probably, it was at first intended to have, the stat. 5 and 6 Ed. VI. c. 9. was made to explain the very passage now under consideration, concerning which there had arisen some doubts: to resolve which that act declares, that though the owner be *in any part* of the house, or *precinct* of the same, yet still the robber should lose his clergy. After this explanation, the difference between robbing a person *in the highway* and *in a dwelling-house*, first originated. For what could this *robbing a person in a house* be? It could not be a robbery, properly so called, for that must be from the person, and with violence, which could not be the case here; for the explanatory words say, that the person might be in any other chamber of the house; nor could it be with violence, for the statute says, it might be committed while the person was asleep; which is a condition not compatible with the violence necessary to constitute a proper robbery. It only remained to imagine a kind of *constructive* robbery, by supposing the violence committed on the house, and not on the person. Consistently with this, robbing a person in a house has been construed to signify

CHAP. XXIX.

HENRY VIII.

ſignify a violence done to the houſe by *breaking*, as well as a ſtealing. Later ſtatutes have purſued this notion, only expreſſing it leſs equivocally, in the phraſe of *robbing a houſe*, inſtead of *robbing a perſon in a houſe*.

By ſtat. 33 Hen. VIII. c. 12. [u] clergy was taken away from perſons ſtealing in any of the king's houſes, whether with a breaking or without.

There is only one more ſtatute relating to robbery, which we ſhall now mention. We have ſeen, that in an appeal, the party proſecuting not only procured a puniſhment to be inflicted on the offender, but alſo recovered the thing ſtolen. This was not ſo in an indictment; and as this mode of proſecuting was now more practiſed than formerly, it was intended to render it equally advantageous to the perſon reſorting to it. It was accordingly enacted, by ſtat. 21 Hen. VIII. c. 11. that if a man robbed or took away any money, goods, or chattels, from the perſon, or otherwiſe, and is indicted, arraigned, and found guilty thereof; or otherwiſe attainted, by reaſon of evidence given by the party, or by procurement of the party ſo robbed, or the owner of the ſaid money or goods; the perſon robbed, or the owner of the things, ſhall be reſtored to them; and the juſtices of gaol-delivery, or other juſtices before whom the conviction was, may award writs of reſtitution, in like manner as in an appeal.

Having thus gone through all the ſtatutes of this king on the offence of larceny and robbery, we ſhall proceed to examine what new felonies were created. Theſe are of a miſcellaneous nature. It was made felony by ſtat. 22 Hen. VIII. c. 11. to cut down or break up any part of the *pow*-dike, and *oldfield* dike, in Norfolk, and the Iſle of Ely; as it was alſo to ſell, exchange, or deliver, any horſe, gelding, or mare, to a Scotchman, by ſtat 23 Hen. VIII. c. 16. or into Scotland, or the batable to the uſe of a Scotchman

[u] Sect. 27.

was

was made felony, to be determined by the wardens of the Marches, by ſtat. 32 Hen. VIII. c. 6. It was declared felony by ſtat. 31 Hen VIII. c. 2. to fiſh with nets, hooks, or baits, in any ſeveral pond, ſtew, or moat, with intent to ſteal fiſh, from ſix in the evening to ſix in the morning, againſt the will of the owners; or to break up the head of any ſuch pond, ſtew, or moat, by day or by night, whereby any fiſh were taken or deſtroyed; and fiſhing in the above manner in the day-time was puniſhed with impriſonment for three months. This was the firſt law which laid the penalty of felony upon any treſpaſſes reſpecting fiſh.

PENAL reſtrictions to protect theſe objects of diverſion and pleaſure, where the royal amuſements were concerned, were carried further by another chapter of this ſame ſtatute [x]; the latter branch of which act deſerves particular notice, becauſe it ſeems to have furniſhed the proviſions which were afterwards revived in the famous *Black Act* of [y] modern times, and was itſelf framed upon the policy of one made in the laſt reign [z]. The following facts were made felony: to take in the king's grounds any egg or bird of a falcon, goſhawk, or laner, out of the neſt (which had been puniſhed with a year's impriſonment by ſtat. 11 Hen. VII. c. 17.); to find or take up any falcon, jerfalcon, jerkin, ſacer or ſacerit, goſhawk, laner or lanerite, of the king's, and having on it the king's arms and verveles, and not to bring or ſend it within twelve days to the maſter of the king's hawks. Then follow the proviſions concerning parks. To enter into any foreſt, chaſe, or park, of the king, queen, prince, or any of the king's children, or into any other ground of theirs, incloſed with a wall or pale, ordained for the keeping of deer, between the riſing and ſetting of the ſun, with the face hid, or covered with hood or viſor, or painted, or otherwiſe diſguiſed, to the intent not to be known, in order to ſteal deer, or drive any of them from the foreſt; or, at any time of the day, with the face

[x] Ch. 12. [y] Stat. 9 Geo. I. [z] Vid. ant. 144.

CHAP. XXIX.

HENRY VIII.

hid and diſguiſed, to kill conies within any ground being the king's warren within any of the parks above-mentioned; or in the night to enter into any park, chaſe, or foreſt, or warren, of the above deſcription, with intent to ſteal deer or conies, was made felony.

THE ſtat. 37 Hen. VIII. c. 6. contains many penalties for the puniſhment of perſons guilty of various ſpecies of malicious miſchief. It was made felony to burn, cut, or deſtroy any frame of timber prepared for building a houſe. The penalty of 10l. to the king, beſides treble damage to the party, was given in the following inſtances of wilfulneſs and malice: for cutting the head of any ponds, ſtews, or pipes of any conduit; burning a cart laden with merchandize, or any heap of wood prepared for making coals, billets, or talwood; the barking of fruit-trees; the cutting out the tongue of any beaſt; or cutting off the ear of any ſubject, otherwiſe than by authority of law, chance-medley, ſudden affray, or adventure; ſome of which enormities have been puniſhed in different manners by later ſtatutes.

AMONG the number of miſdemeanours for which various kinds of penalties were ordained in this reign, beſides thoſe juſt mentioned, ſuch only as make the ſubject of the three following ſtatutes, can deſerve a place in this hiſtorical view of our laws: theſe are, ſtat. 22 Hen. VIII. c. 10. of Egyptians; ſtat. 32 Hen. VIII. c. 9. of ſelling pretenced titles, and embracery of jurors; and ſtat. 33 Hen. VIII. c. 1. of cheating with privy tokens; with others concerning unlawful games and ſhooting.

Law againſt gypſies.

THE firſt of theſe laws deſcribes that ſet of people who were then new-comers in this country, as "outlandiſh "perſons calling themſelves *Egyptians*, uſing no craft or "feat of merchandize, who come into this realm and go "from ſhire to ſhire and place to place in great company, "and uſed great ſubtil and crafty means to deceive the "people, bearing them in hand, that they by palmeſtry "could tell men's and women's fortunes; and thus many "times by craft and ſubtilty had deceived the people of "their

"their money, and alſo had committed many heinous felonies and robberies." This was the deſcription given of theſe wanderers. It was now enacted, that if any ſuch perſons came within the realm, they ſhould forfeit all their goods and chattels, and ſhould leave the kingdom within fifteen days after command ſo to do, upon pain of impriſonment. All ſheriffs and juſtices of the peace were empowered to ſeize their property for the king's uſe. If they were to be tried for any felony, they were not to be entitled to the privilege of ſtat. 8 Hen. VI. which gave a jury *de* [a] *medietate linguæ*. As to all thoſe then within the realm, they had ſixteen days to depart; and if they overſtaid that time, they were to be impriſoned, and forfeit all their goods and chattels.

THE ſtat. 32 Hen. VIII. c. 9. ſtates the inconveniencies which enſued from maintenance, embracery, champerty, ſubornation of witneſſes, ſiniſter labour, buying of titles and pretenced rights of perſons not being in poſſeſſion. It enacts, that all former laws againſt maintenance, champerty, and embracery, ſhall continue in force, and be put in execution: and it moreover enacts, that no one ſhall bargain, buy, or ſell, any pretenced rights or titles in lands, or tenements; and if any ſuch bargain, ſale, promiſe, covenant, or grant, be made, and the ſeller has not himſelf nor his anceſtors been in poſſeſſion of the ſame, or of the reverſion or remainder, or taken the rents or profits, for one whole year next before the ſale, both buyer and ſeller ſhall forfeit the whole value of the land, half to the king, and half to the perſon who ſues for it. A proviſo was added, allowing perſons in poſſeſſion, by taking the yearly profits, to buy any pretenced title or right of any other perſon. Maintenance of any ſuit, embracery of jurors, or ſubornation of witneſſes, are ſeverally puniſhed, in addition to the penalty of former ſtatutes, with a forfeiture of 10l.

[a] Vid. ant. vol. III. 280.

CHAP. XXIX.

HENRY VIII.

half to the king and half to the party ſuing, which muſt be within a year. The buying of pretenced titles had grown more frequent, ſince uſes had become ſo common; and thus gave occaſion to this ſtatute.

Cheating by falſe tokens.

CHEATING was at common law an offence puniſhable by fine, impriſonment, and pillory. Some new proviſions are made by ſtat. 33 Hen. VIII. c. 1. reſpecting one ſpecies of it. This ſtatute ordains, that if any one falſely and deceitfully obtain, or get into his hands or poſſeſſion, any money, goods, chattels, or other things of another perſon, by colour and means of any falſe token, or counterfeit letter made in another man's name, and ſhall be convicted thereof by witneſſes before the chancellor, or by examination of witneſſes, or confeſſion in the ſtar-chamber, or before the juſtices of aſſiſe, of the peace, or by action in any court of record, he ſhall ſuffer any corporal pain (except death) which ſhall be adjudged. It ſhould ſeem that no alteration was made by this ſtatute in the offence, which remains as at common law; only the juriſdiction over it was extended, and the power of puniſhing enlarged. Juſtices of aſſiſe and of the peace are authoriſed by proceſs, or otherwiſe, to cauſe perſons ſuſpected of this offence to be taken and kept till the aſſiſes or ſeſſions.

Gaming.

AMONG the penal laws of this king we find ſome reſtrictions impoſed upon certain diverſions, with a more ſtrict hand than the legiſlature had applied in any former time. Gaming and the killing of game were the objects of ſeveral acts of parliament. The two acts that aimed directly at the latter, were intended rather for repreſſing the depredations of thoſe who have ſince been called poachers,[a] than to circumſcribe the amuſement of the ſportſman. By ſtat. 14 and 15 Hen. VIII. c. 10. no perſon of whatſoever eſtate, degree, or condition, was to trace, deſtroy, or kill any hare in the ſnow; juſtices of peace in their ſeſſions, and ſtewards of leets, had authority to enquire of ſuch offenders, and to fine them 6s. 8d. for every hare killed. The ſtat.

[a] Vid. ant. vol. III. 215.

25 Hen.

25 Hen. VIII. c. 11. was for the protection of wild-fowl, which uſed to be taken while the old were moulting, and while the young were not able to fly. To prevent this, it was ordained, that between the laſt day of May and of Auguſt, none ſhould take wild-fowl in nets, or other engines, on pain of a year's impriſonment, and four-pence fine for every fowl, to be enquired of by juſtices of the peace. There was a proviſo, that any gentleman, or other who can ſpend forty ſhillings per annum of freehold, might hunt and take them with ſpaniels, without uſing any net or engine, except it was a long bow. There were penalties alſo on thoſe who took their eggs.

THIS exception in favour of the long-bow was in the ſame ſpirit which the legiſlature manifeſted in the laſt reign and in this, by ſeveral proviſions made before and after this act. This martial weapon, which the Engliſh archers were ſo famous for managing, had lately been going out of repute; and croſs-bows and hand-guns were now the faſhionable inſtrument, whether for diverſion or uſe. Theſe new-invented weapons, from their commodious form, had been applied to the deſtruction of game, which was an additional reaſon for endeavouring to diſcourage them, and to bring the long-bow again into vogue. To effect this, ſeveral acts were made, which, by a ſide wind, became in effect ſo many game-laws. In the preamble of ſtat. 19 Hen. VII. c. 4 the unlawful application of the croſs-bow to kill the king's deer, and the univerſal diſinclination to uſe the long-bow, that had made us once ſo formidable to our enemies, is very ſtrongly and feelingly ſtated; and it is there enacted, that no perſon, without the king's ſpecial licence, under this placard, ſigned and ſealed with his privy-ſeal or ſignet, ſhould occupy or ſhoot in any croſs-bow (unleſs he ſhot out of a houſe for defence thereof), except he be a lord, or have lands of freehold of 200 marks per annum, on pain of forfeiting it, with its apparel, to any perſon who would take it. By ſtat. 3 Hen. VIII. c. 13. the qua-

CHAP. XXIX.

HENRY VIII.

qualification was raiſed to 300 marks, and all licences granted before that act are declared void. Hitherto the ſtatutes were confined to croſs-bows; but ſtat. 6 Hen. VIII. c. 13. prohibited ſhooting either in croſs-bows or hand-guns; which latter, probably, were juſt come into faſhion: beſides forfeiture of the inſtrument, there was a penalty of 10l.: no man was to keep ſuch inſtruments in his houſe on pain of impriſonment, and a penalty of 10l. All placards were declared void, and the offence was to be examined before the council, as well as before juſtices of the peace. By ſtat. 14 and 15 Hen. VIII. c. 7. the qualification was leſſened to 100l. per ann. in a man's own right, or the right of his wife; and the penalty was lowered to forty ſhillings. All placards were declared void. Some ſmall variation was made in this regulation by ſtat. 25 Hen. VIII. c. 17. This, like the former acts, declared void all former placards.

THESE were followed by ſtat. 33 Hen. VIII. c. 6. which repealed all the former laws, and is the principal act upon this ſubject. The chief regulations of this act were theſe: the prohibited inſtruments here mentioned are the croſs-bow, hand-gun, hagbut or demihake; and they were not to be uſed or kept under penalty of 10l. unleſs by a perſon having 100l. per ann. But hand-guns that were not full a yard in ſtock and gun, and hagbuts and demihakes not being three quarters of a yard, were forbid to all perſons under pain of 10l.; and perſons having 100l. per ann. might take ſuch ſhort inſtruments, or any croſs-bows, from perſons who had them. This act contains a number of proviſions too long to enumerate. Among others one was, that all placards ſhould in future be void. Lords and gentlemen, and inhabitants of cities and towns, might ſhoot at butts or banks with hand-guns of a proper length.

THUS far proviſion was made for prohibiting the new-invented weapons. Meantime, the legiſlature did not neglect to make regulations for encouraging the exerciſe of the

the long-bow. As the former courſe of acts had an eye to the unlawful deſtruction of the game, the latter kept in view the many unlawful games in which the people indulged themſelves in preference to that of ſhooting in the long-bow: ſo that as the former were a ſpecies of game-laws, the latter were acts againſt gaming. The firſt of theſe acts was ſtat. 3 Hen. VIII. c. 3. which act was made perpetual, and the policy of it purſued by ſtat. 6 Hen. VIII. c. 2. but both theſe were repealed by ſtat. 33 Hen. VIII. c. 9. This act is ſtill in force, and, as it contains more general and effective proviſions than any later ſtatute, for ſuppreſſing public gaming-houſes, it is particularly worthy of notice.

THIS act purports to be made in conſequence of the complaint and petition of the bowyers, fletchers, ſtringers, and arrowhead-makers; and it enacted, that every perſon, not being lame or decrepid, within the age of ſixty (except ſpiritual perſons, the judges and juſtices of aſſiſe), ſhould uſe and exerciſe ſhooting in long-bows, and have a bow and arrows continually in his houſe for that purpoſe. Fathers and governors of thoſe of tender age were to teach them to ſhoot; having for every male child of ſeven years old in his houſe, till he was ſeventeen, a bow and two ſhafts to induce him to learn. Where ſuch young people were ſervants, their maſters were to abate out of their wages the prices of ſuch bows and arrows. After ſeventeen years, ſuch young perſons were to provide themſelves with a bow and four arrows. If any father, or maſter of a family, or ſervant, failed herein, he was to forfeit ſix ſhillings and eightpence. Theſe proviſions are followed by ſeveral about building butts, the prices of yew, and other bows: and all breaches of theſe regulations were made cogniſable by the juſtices in ſeſſions and ſtewards in their leets.

THESE are followed by the regulations about unlawful games, which are as follow: No perſon by himſelf, or his

CHAP. XXIX.

HENRY VIII.

his ſervant, or other perſon, for his gain, livery, or living, was to keep, have, hold, occupy, exerciſe or maintain any common houſe, alley, or place of bowling, coyting, cloyſh-cayls, half-bowl, tennis, dicing-table, or carding, or any other manner of game prohibited by any ſtatute heretofore made, or any unlawful game hereafter to be invented, on pain of forfeiting, for every day of keeping ſuch place or ſuffering ſuch game, forty ſhillings; and every perſon uſing and haunting ſuch houſes and plays, and there playing, for every time ſix ſhillings and eight-pence. Every placard to keep a common gaming-houſe contrary to this act, was to ſpecify the game and perſons to play at it, or was to be void; and perſons obtaining ſuch placard, before they put it into execution, were to find ſureties not to uſe the placard contrary to this ſtatute: but theſe placards were declared void by a ſubſequent ſtatute[b]. Juſtices, mayors, and other head-officers, are authorized to enter into houſes where games are ſuſpected to be exerciſed contrary to this act, and to arreſt the keepers and perſons there reſorting, and keep them in priſon till they reſpectively find ſureties not again to offend. Such head-officers are directed to make ſearch weekly, or, at furtheſt, once a month, for ſuch houſes; and if they neglected for a month, they were to forfeit forty ſhillings. No artificer, huſbandman, apprentice, journeyman, labourer, or ſerving-man, was to play at tables, tennis, dice, cards, bowls, or any other unlawful game, out of Chriſtmas, under pain of twenty ſhillings for every ſuch offence. At Chriſtmas they were only to play in the houſes or in preſence of their maſters. None, at any time, were to play at ball in open places, out of a garden, or orchard, under pain of 6s. 8d. All leaſes of houſes, where unlawful games were exerciſed, are declared void. There are two proviſos to this act; one

[b] Stat. 2 and 3 Ph. and Ma. c. 9.

allowing

allowing maſters to licenſe their ſervants to play at cards, dice, or tables, with them, or with any other gentleman, in their maſter's houſe or preſence; the other allowed any nobleman, or perſon, having 100l. per ann. to licenſe his ſervants or family, to play within the precinct of their houſes, gardens, or orchards, at cards, dice, tables, bowls, or tennis. All other ſtatutes againſt unlawful games were repealed, ſo that this act became the code of law upon this important article of Police.

The laſt penal law made in this reign was for the puniſhment of an offence which had been encouraged, if not occaſioned, by the many bloody laws concerning treaſon which had gone before it; and may be reckoned as one very ſtrong inſtance of the ill conſequences attending a multiplicity of penal laws. Many evil-diſpoſed perſons availing themſelves of the then ſtate of things, when almoſt every public offence was treaſon, and every treaſon was infallibly puniſhed as the law directed, had endeavoured to bring thoſe whom they diſliked under ſuſpicions, by dropping papers conveying accuſations of crimes againſt perſons by name. To repreſs this abominable practice, it was by ſtat. 37 Hen. VIII. c. 10. ordained to be felony without clergy for any perſon to make, or cauſe to be made, a writing compriſing a charge of treaſon, and to leave it in an open place where it might be found; unleſs the party ſo doing ſubſcribed his name to it, and within twelve days appeared in perſon before the king or his council, and there affirmed the truth thereof, and did his endeavours to prove it. A proviſion of this kind was never more neceſſary than at this period; although the act did not quite diſcountenance this mode of information, it inflicted a proper puniſhment on the worſt ſpecies of it. In puniſhing with death thoſe who ſo inſidiouſly endangered the lives of others, this act ſo far purſued the ſpirit of our old law, which adjudged to death ſuch perjured perſons,

as,

CHAP. XXIX.

HENRY VIII.

as, by their falſe oath, had effected the conviction and execution of an innocent man [c].

THE remaining ſtatutes of this reign which any way affect our criminal juriſprudence, are ſuch as were contrived to bend and accommodate the proceedings at common law, ſo as to facilitate the trial, and inſure the puniſhment of offenders; ſuch as extended the common-law trial to caſes which were before cogniſable by another rule of determination; ſuch as inſtituted or altered ſome new-invented tribunals of criminal juſtice; and, laſtly, thoſe that deprived many offenders of the benefit of clergy and ſanctuary.

THE firſt act that made any change in the courſe of criminal proſecutions, is ſtat. 3 Hen. VIII. c. 12. Complaint had been made, that ſheriffs and other officers returned jurors for the king, who would readily perjure themſelves for corrupt purpoſes. To remedy this, power was given to juſtices of gaol-delivery, and of the peace, to reform the pannel, by putting in and taking out of names: this was confined to juries that were to enquire for the king. The next was ſtat. 4 Hen. VIII. c. 2. which has been before mentioned as taking away clergy from certain offences. The ſecond clauſe of that act was pointed againſt an abuſe of the plea of ſanctuary, when felons uſed to alledge that they had been taken out of a privileged place in ſome foreign county, in order to delay the trial, which by law ought to be in ſuch alledged county. To prevent this it was ordained by this act, that ſuch foreign pleas ſhould be tryed by the jury of the county that was to try the felony. This act was temporary, and having expired by the meeting of a new parliament in the 7th of the king, was revived and made perpetual by ſtat. 22 Hen. VIII. c. 2. Another deviſe to elude juſtice was, for murderers and felons, upon untrue ſuggeſtions, to re-

[c] Vid. ant. vol. II. 353.

move

move themſelves and their indictments before the king's bench, which could not afterwards remit them into the county, till ſtat. 6 Hen. VIII. c. 6. gave the court that authority to remand both, and to command the juſtices of gaol-delivery, of the peace, or other, as the caſe might be, to proceed thereon. By ſtat. 23 Hen. VIII. c. 13. the challenge of a juror, in trials of murder and felony in cities and towns corporate, for want of freehold, was taken away.

Trial of treaſon committed in Wales;

AFTER ſo far deviating from the old rule which governed trials, as to make an *incidental circumſtance* triable in a foreign county, the parliament ventured further, and made *offences* committed in one county and place triable in another. To remedy the diſorders following from the relaxed ſtate of the judicial œconomy in Wales and its marches, it was enacted, as has been related, by ſtat. 26 Hen. VIII. c. 6. among other regulations for the reformation of judicature there, that coiners and felons within any lordſhip marcher of Wales ſhould be tried in the next Engliſh county; and when theſe lordſhips were divided into counties, by ſtat. 34, 35 Hen. VIII. c. 26. it was declared [d], that this proviſion ſhould ſtill continue in force. In the mean time it had been enacted, by ſtat. 32 Hen. VIII. c. 4. that all treaſons, and miſpriſions of treaſon, committed within the principality of Wales and its marches, or whereſoever the king's writ runneth not, ſhould be tried by a commiſſion of *oyer and terminer whereſoever* the king ſhall appoint.

and committed out of the realm,

THE policy of trying treaſons in *any* county that the king ſhould pleaſe to appoint, had been firſt begun by ſtat. 26 Hen. VIII. c. 13. which enacted, that any offence *made treaſon by that act, or that was before* held treaſon, committed out of the limits of the realm, *in any outward parties*, ſhall be enquired of *in ſuch county* of the realm,

[d] Sect. 85.

and

CHAP. XXIX.

HENRY VIII.

and before ſuch perſons, as it ſhould pleaſe the king to appoint by commiſſion: and to enforce this new method of proceeding, it was alſo enacted, that proceſs of outlawry againſt offenders in treaſon being reſident out of the realm, or in any parts beyond the ſeas, at the time of the outlawry pronounced, ſhould be as good and valid as if they were within the kingdom at the time. The proviſion of this act was extended by ſtat. 35 Hen. VIII. c. 2. to offences *hereafter to be made* or declared treaſon, miſpriſion or concealment of treaſon; and it was added alſo by this laſt ſtatute, that peers ſhould, notwithſtanding, be tried by their peers in this caſe, as well as in others; leſt the novelty of this proceeding, enacted generally, ſhould be conſidered as ſo far excluding peers from their common-law trial.

We here ſee the ſteps the legiſlature made in the introduction of this novelty of foreign trials. Firſt, coining and felonies committed in Wales and the marches, were to be tried in the *next* Engliſh county, by ſtat. 26 Hen. VIII. Next, in the ſame year, it was ordained, that treaſons committed *out of the realm* might be tried in *any* county. About ſix years afterwards, it was enacted by ſtat. 32 Hen. VIII. that treaſons committed in *Wales* ſhould be enquired of in *any* county: and now, in the next year we find two ſtatutes which directed, that treaſons or murders done *within* the realm, might be tried in *any* county the king ſhould pleaſe to appoint. The next to theſe is ſtat. 33 Hen. VIII. c. 20. concerning trials of lunatics who had committed treaſon, of which we ſhall ſay more hereafter. After this is chap. 23. of the ſame ſtatute, which ordained, that any perſon being examined before the king's council, or three of them, upon any treaſon, miſpriſion of treaſon, or murder, and who confeſſed the ſame, or was violently ſuſpected, ſhould be tried by a commiſſion of *oyer and terminer in ſuch ſhire* as ſhould be appointed by the king. In ſuch trials, the challenge

challenge of a juror for want of a freehold of forty ſhillings a-year was taken away; and a peremptory challenge was, for the future, to be allowed *in no caſe* of high-treaſon, or miſpriſion. There was the like ſaving of the right of peers in this, as had been in the former act.

THE ſtatute for the trial of *lunatic* traitors, juſt alluded to, has more remarkable circumſtances in it than thoſe concerning the locality of trial; and is a cruel inſtance of the anxiety in the government that no offender ſhould, by any poſſibility, eſcape puniſhment. It directed, that if any perſon was of ſound memory, when examined before the king's council on a charge of high-treaſon; and after his examination and confeſſion thereof, he ſhould happen to fall to madneſs, or lunacy; yet, if it ſhould appear by the teſtimony of four of the council, that he was at the time of examination of ſound memory, a commiſſion of *oyer and terminer* might be iſſued into *any ſuch ſhire as the king pleaſed*, where the offender was to be indicted and arraigned *in his abſence*, witneſſes heard, verdict found, judgment paſſed, and the party to be executed thereon, as if the proceeding had been in his preſence.

IF the ſimplicity and moderation of our old law was violated by the many new-fangled treaſons and other penalties enacted in this reign, the candour of the ancient method of trial was not leſs deſtroyed by the extravagant innovation of this ſtatute; nor was that which we mentioned next before, very compatible with the original notion upon which the trial by jury was founded.

THESE laſt-mentioned ſtatutes, as they took away ſome of the great advantages derived from the trial by jury, tended to reſtrain it; unlike that act which made treaſons committed out of the realm capable of being tried by a jury in any county, which ſo far contributed to impart to a new ſort of offenders the benefit of this tribunal. The ſame may be ſaid of that ſtatute which made *piracy* examinable by a jury, in a proceeding at common law. This act

Trial of pirates.

CHAP. XXIX.

HENRY VIII.

act was made in the following year, upon the ſame ideas, and with the ſame deſigns.

THERE were two ſtatutes made for the trial of pirates and robbers on the ſea, ſtat. 27 Hen. VIII. c. 4. and 28 Hen. VIII. c. 15. containing the ſame proviſions in every reſpect; with this only difference, that the former allowed *three* of the commiſſioners to be a quorum, the latter required *four*. All piracy, theft, robbery, and murder upon the ſea, were heretofore tried before the admiral, his lieutenant, or commiſſary, according to the courſe of the civil law; the nature of which is, ſays the preamble of the ſtatute, "that before any judgment of death can be given "againſt offenders, either they muſt plainly confeſs their "offence (which they will never do without torture or "pains), or elſe their offence be ſo plainly and directly "proved by witneſſes indifferent, ſuch as ſaw their "offence committed; which could not always be got; "either becauſe they murdered thoſe they robbed, or "the parties who were preſent at the fact, being ſea-"faring people, were continually changing place." Theſe are the reaſons ſtated in the act for recurring to a new mode of inquiry. It was therefore ordained, that all ſuch offences done upon the ſea, or in any haven, river, or creek, where the admiral pretends to have juriſdiction, ſhall be enquired and determined in ſuch county as ſhall be limited by the king's commiſſion, as if the offence had been committed on land. Theſe commiſſions are to be directed to the admiral, his lieutenant, deputy, and three or four ſuch other ſubſtantial perſons as ſhall be named by the lord chancellor, authoriſing them, or four of them at the leaſt, to hear and determine ſuch offences after the common courſe of the laws of the realm, in caſes of treaſon, felony, murder, robbery, and confederacies committed upon land; with the ſame order, proceſs, judgment, and execution: and perſons convicted thereby are to ſuffer ſuch pains of death, loſs of land, goods, and chattels, as

if

if they had been attainted and convicted of any treaſon, felony, or robbery, without benefit of clergy or ſanctuary. This ſtatute gives a common-law trial in a caſe which was not before cogniſable thereby, but only by the civil law. Piracy ſtill remains an offence by that law, as it was before this ſtatute; but it is now ſubject to forfeiture of lands and goods, like a felony. It is not made *felony*, nor has it the properties of felony. There is no corruption of blood, nor are there any acceſſaries before or after the fact; at leaſt as the crime ſtood upon this act; though alterations to that effect have been made by later ſtatutes [e]; and it has been held, that a pardon of all felonies does not pardon piracy [f].

As the admiral had, by the common law, cogniſance of crimes *on the ſea*, the court of the conſtable and marſhal [g] heard and determined all offences committed on land out of the realm: both theſe courts proceeded according to the civil law; and the new regulations made by theſe three ſtatutes relating to piracy and treaſons done out of the realm, in preſcribing theſe new modes of trial, ſo far extended the juriſdiction of the common law; and have therefore been held not to be repealed by ſtat. 1 Ph. and Mar. which ordained, that all trials for treaſon ſhould be according to the due order and courſe of the common law.

THERE was a new criminal court erected by ſtat. 33 Hen. VIII. c. 12. to be held before the lord great maſter [h], or lord ſteward of the king's houſhold; and in their abſence, before the treaſurer, comptroller, and ſteward of the Marſhalſea, or two of them, whereof the ſteward of the Marſhalſea was to be one. They were to hear and

Trial of bloodſhed in the palace.

[e] Stat. Will. III. and Geo. II.

[f] 3 Inſt. 112.

[g] Vid. ant. vol. III 194.

[h] This great officer was a new appointment made by Henry for his favourite, Charles Brandon, duke of Suffolk. By ſtat. 32 Hen. VIII. c. 39. he was to have all authority that the lord ſteward of the houſhold had. This act was repealed by ſtat. 1 Mar. ſtat. 3. c. 4. and the office of lord ſteward reſtored. The title in the ſtatute of Henry VIII. is that of *lord great maſter of the houſhold*, or, *grand maiſter del hoſtel du Roy*.

determine

CHAP. XXIX.

HENRY VIII.

determine all treaſons, miſpriſions of treaſon, murders, manſlaughters, bloodſheds, and malicious ſtrikings by reaſon whereof blood was ſhed, within any of the palaces or houſes of the king, while he was perſonally reſident there. The enquiry was to be by a jury of yeomen officers in the cheque roll. The puniſhment of malicious ſtriking and bloodſhed was, that the right hand ſhould be ſtruck off; and, "for a declaration of the ſolemn and due "circumſtances of the execution," as the ſtatute ſays, it aſſigns ſome part in this bloody rite to almoſt every officer in the houſhold; which is ſaid by the act to have been a ceremony of long time uſed and accuſtomed. It probably was ſo; for the ceremonial ſeems to outdo even all the exquiſiteneſs of penal legiſlation which we have before related in this remarkable reign. The act directs, with great preciſion, that the ſerjeant-ſurgeon is to be preſent to ſear the ſtump, when the hand is ſtricken off; the ſerjeant of the pantry, to give bread to the offender after the operation; and the ſerjeant of the cellar, with a pot of red wine to give him to drink; the ſerjeant of the ewry, with cloths; the yeoman of the chandry, with ſeared cloths; the maſter-cook, with a dreſſing-knife, who is to deliver it to the ſerjeant of the larder to hold it upright during the execution; the ſerjeant of the poultry, with a cock to wrap about the ſtump; the yeoman of the ſcullery, with a pan of coals to heat the ſearing-irons; and the ſerjeant ferror, to bring the ſearing-irons; the groom of the ſalcery, with vinegar and cold water; and laſtly, the ſerjeant of the wood-yard to bring a block, with a betel, a ſtaple, and cords to bind the hand upon the block till execution is done. This formality, which probably was deſigned to ſtrike terror into the whole houſhold, and prevent the diſorders it was meant to puniſh, ſounds more like the ordinance of ſome rude people in the infancy of legiſlation, than the proviſion of a wiſe and poliſhed nation. This barbarous judgment, we are informed, was actually executed

cuted on Sir Edmund Knivet, at Greenwich, for ſtriking a man, the king then being there. This was in 33 Hen. VIII. and probably was a proceeding under this act of parliament [i]. It ſhould be remembered, that this is a different tribunal from that erected by ſtat. 3 Hen. VII. c. 14 *. which is to be held before the ſteward, treaſurer, and comptroller, for felony in conſpiring the death of the king, any lord, or privy-counſellor.

OTHER methods of enquiry were contrived in this reign for the determination of offences againſt certain ſtatutes. Theſe were numerous and various; and yet hardly deſerve notice. Among theſe may be reckoned the following. By ſtat. 21 Hen. VIII. c. 20. an alteration, which has been noticed in another place, was made in the conſtituent members of the ſtar-chamber. By ſtat. 31 Hen. VIII. c. 8. a particular juriſdiction was framed to enquire of thoſe who diſobeyed the king's proclamations, which was again qualified by ſtat. 34 and 35 Hen. VIII. c. 23. The trial of this offence was to be in the ſtar-chamber, before certain great officers of ſtate enumerated in the firſt act; but by the latter it was to be before any nine privy-counſellors, two of whom were to be the chancellor, treaſurer, preſident, privy-ſeal, chamberlain, admiral, or a chief-juſtice. By ſtat. 31 Hen. VIII. c. 14. the act of the ſix articles, ſome direction was given for enquiry concerning offences againſt that act; and this underwent ſome change by ſtat. 35 Hen. VIII. c. 5. By the former act commiſſions were to be awarded to the biſhop of the dioceſe, his chancellor, commiſſary, and others, to enquire of thoſe offences. Juſtices of the peace alſo, in their ſeſſions, and ſtewards of leets, might, by the oaths of twelve men, enquire thereof. By the latter, no one was to be put to his trial but upon a preſentment or indictment found by twelve men before ſpecial commiſſioners, or juſtices of the

[i] Bro. Peine. 16.

* Vid. ant. 145.

CHAP. XXIX.

HENRY VIII.

peace, or of oyer and terminer; and theſe were to be found within one year after the offence committed.

A REIGN ſo fruitful as this in penal laws, did not want expedients for putting them in force. To anſwer this purpoſe more effectually, the common-law proceedings were varied, commiſſions of a new ſort were framed, and new methods of examinations were deviſed: all this contributed to introduce much novelty and confuſion. Much of this confuſion and moſt of theſe novelties were removed by the great repealing ſtatutes 1 Ed. VI. and 1 Mar. and 1 and 2 Ph. and Mar. While theſe innovations were multiplying, we are pleaſed to find ſome regulations reſpecting the antient tribunals. It was in conformity with a former ſtatute[k] declared, by ſtat. 33 Hen. VIII. c. 24. that no juſtice, nor other man learned in the laws of the realm, ſhould exerciſe the office of juſtice of aſſiſe in the county where he was born, or then inhabited. By ſtat. 33 Hen. VIII. c. 10. the juſtices of the peace were required to divide themſelves, two at leaſt, into every hundred, and hold a ſeſſion for ſuch reſpective diviſions, ſix weeks before the quarter-ſeſſion, to enquire of vagabonds, giving of liveries and badges, maintenance, embracery, unlawful games, and other offences, and hear and determine the ſame. But this ſix weeks ſeſſion was found to be too burthenſome, and was repealed by ſtat. 37 Hen. VIII. c. 7. which directed the juſtices to take cogniſance of all thoſe offences at their quarter-ſeſſions.

WE now come to conſider the alterations made in the law of clergy and ſanctuary. The acts upon this head are ſuch as either take thoſe privileges from certain offenders, or ſuch as make any regulation concerning perſons who were ſtill to be indulged with them. In order to ſhew the ſteps by which the legiſlature advanced in aboliſhing theſe antient exemptions from the proceſs of criminal juſtice, it will be, perhaps, the cleareſt method, to take a

[k] Stat. 8 Ric. II. c. 2. Vid. ant. vol. III. 200.

view

view of them altogether, in the order in which they were paſſed.

The benefit of clergy taken away.

THE taking the benefit of clergy from certain offences had been begun in the laſt reign, when it was taken from the deſertion of ſoldiers, and from petit-treaſon [1]. It was thought proper now to purſue the ſame courſe with robbers and murderers, who, ſays the preamble of the ſtatute, "*bear them bold of their clergy, and live in manner* "*without fear or dread*;" for reformation of which it was enacted, by ſtat. 4 Hen. VIII. c. 2. that all perſons committing murder or felony, in any church, chapel, or hallowed place; or who of malice prepenſed rob or murder any perſon in the king's highway, or rob or murder any perſon in his houſe, the owner or dweller of the houſe, his wife, child, or ſervant, then being therein and put in fear or dread, ſuch perſon ſhall not be admitted to his clergy. There was an exception in favour of thoſe in holy orders. This act was only temporary, in order to try the temper of the people, as to ſuch innovations upon the antient ſuperſtition of the realm: it was to laſt only to the next parliament. The manner in which this ſtatute was received by the clergy, will appear from a tranſaction which we ſhall relate at length: it will be thence ſeen with what zeal and what arguments they maintained this claim, even at the period when it was ſo near its final diſſolution; and how far they had weight, even with this abſolute monarch, to ſuſpend, for a time, the effect of his reſolution to aboliſh their privileges.

IN the 7th Hen. VIII. while the parliament was ſitting, the abbot of Winchcome, in his ſermon at Paul's Croſs, declared to the people, that this act was contrary to the law of God, and the liberties of the church; and that all thoſe who were parties to the enacting of it, had incurred the cenſures of holy church. In ſupport of this declaration, he ſhewed them a decree which pronounced, that *tam minòres quàm majores ordines ſunt ſacri*; and therefore, that all

[1] Stat. 7 Hen. VII. c. 1. ſtat. 12 Hen. VII. c. 7. Vid. ant. 156.

who

CHAP. XXIX.

HENRY VIII.

who had received any kind of orders, were exempt from temporal puniſhment *pro cauſis criminalibus*, before the temporal judge. This critical time for ſo open an attack on the legiſlature was probably choſen, in order to prevent a revivor of this ſtatute, which, by the terms of its continuance, had now expired. Such conduct was noticed by the king, who, at the inſtance of ſeveral temporal lords and members of the houſe of commons, reſolved, that the point ſhould be fully and ſolemnly debated before the judges, and the king's temporal council [m]. There was accordingly a meeting held at Blackfriars; and there appeared ſeveral divines and canoniſts to argue the matter on both ſides, for the king and for the clergy. Upon this argument, it was thought that thoſe who ſpoke for the temporal power had the advantage, and many preſſed that the biſhops ſhould be required to uſe their authority with the abbot, and make him recant what he had preached; but they ſtrenuouſly declined it; and ſaid, on the contrary, that they were bound by the law of holy church to maintain the abbot's opinion with all their power: and thus the matter reſted for ſome months, without any thing deciſive being concluded upon.

The queſtion of clergy debated before the council.

An incident ſoon happened which revived this queſtion, and brought it once more to iſſue in a more ſolemn manner. *Doctor Horſey*, chancellor to the biſhop of London, had cauſed one John Hunne to be taken up on a charge of hereſy, and had committed him to the Lollards tower, as it was called, in St. Paul's. Soon afterwards this man was found hanging in his chamber; and a ſuſpicion of murder fell upon the gaoler and *Doctor Horſey*. This was increaſed by the former taking refuge in the ſanctuary at Weſtminſter; and the world were ſatisfied of the juſtneſs of their ſuſpicions, when the coroner's inqueſt found them both guilty of the murder. Before this verdict was given, the

[m] *Juſtices et temporal counſeil del roy.* Keilw. 181.

biſhops,

biſhops, perceiving what courſe the affair was likely to take, and foreſeeing the conſequences it might be productive of, ſince the late diſpute at Blackfriars, thought they would make their ground more ſure, by ſtriking the firſt blow; and therefore they ſummoned *Doctor Standiſh* (who was the principal of thoſe who had argued at the late meeting againſt the exemption from temporal juriſdiction) to appear before the convocation. Here they objected to him, that he had maintained certain opinions which were contrary to thoſe taught by holy church. The particular articles were exhibited to him in a formal bill by the archbiſhop of Canterbury, and were none other than what had been the ſubject of controverſy at Blackfriars. The Doctor, finding that they meant to make this a matter of hereſy, applied to the king for protection againſt the perſecution of the clergy, which he had excited only by his zeal for maintaining the temporal authority of the king's courts. The clergy alſo addreſſed the king; proteſted that they did not proceed againſt this man for any thing he had ſaid at the conference in behalf of the king's power, but for doctrines advanced at certain lectures ſince; and adjured the king, by his coronation oath, and as he would avoid the cenſures of the church, to aſſiſt them in their enquiry. The temporal lords and the judges, with the commons houſe of parliament, in their turn addreſſed the king, and preſſed him by the like obligation of his coronation oath, to maintain his temporal juriſdiction, and give all aſſiſtance to Doctor Standiſh, who was attacked by the malice of the clergy, for advancing what was the ſame in effect as he had urged in oppoſition to the ſermon of the abbot; and that the biſhops were attempting to eſtabliſh all the points maintained in that famous diſcourſe. Upon this the king conſulted with *Doctor Veſey*, the dean of the chapel; and it being his opinion, that the making the clergy anſwer before the temporal judges, as uſed in this country, was very compatible with the law of God, and the liberties of the church,

CHAP. XXIX.

HENRY VIII.

church, Henry once more called an aſſembly at Blackfriars, conſiſting of the judges and all the council, as well thoſe of the ſpiritualty as temporalty [n], and certain perſons of the parliament. There the bill againſt Doctor Standiſh was read, and the whole matter again fully diſcuſſed. The ſubſtance of the arguments on both ſides, at the former aſſembly and at this, was as follows:

THOSE who maintained the exemption of the clergy from temporal juriſdiction in criminal caſes, inſiſted on the papal decree before-mentioned. They contended this was expreſs, and all perſons who were of the Chriſtian religion were bound to obey it, under pain of a mortal ſin; and *therefore*, that the putting of the clergy to anſwer for offences before the temporal tribunal, was *peccatum in ſe*. They ſaid, the privilege of clergy was eſtabliſhed by the expreſs command of Jeſus Chriſt, in theſe words, *nolite tangere Chriſtos meos*; and every law of man which militated with this divine command, was damnable in itſelf; and *therefore*, they again concluded, that bringing clerks before the temporal courts for crimes, was *peccatum in ſe*. They ſaid, that the temporal judge could no more juſtify the arraigning his *ſpiritual father*, than he could juſtify the arraigning his *natural father*, which would be a breach of God's expreſs commandment, "*Honour thy father*," &c. which words extend as well to the ſpiritual as the natural father; and no diſobedience of the ſon in breaking this law could be juſtified by uſage or cuſtom.

To this it was anſwered, that the ſtat. 4 Hen. VIII. and the arraignment of clerks before the temporal judges, were compatible with the law of God and the liberties of the holy church; that this proceeding had in view the public good of the whole kingdom, which ought to be favoured by all laws. As to the papal decree, and that a breach of it was *peccatum in ſe*, God forbid, ſaid they,

[n] *Tout le counſeil del roy ſpiritual et temporal.* Keilw. 183.

that

that ſuch a concluſion ſhould be made; for there is another decree of equal authority, which requires all biſhops to be reſident at their cathedrals at every feaſt of the year, tho' we ſee that the greater part of them never comply with it. Beſides, this decree was never received in England, and therefore cannot bind here; and the uſage, both before and after the making of it, has always been to the contrary. That before the time of St. Auſtin, marriage was permitted to prieſts; but then a decree was made to forbid it: and becauſe this decree was received in England, as well as in many other places, therefore it became the law that prieſts ſhould not marry. But in ſome parts of the world this law was never received; as among Chriſtians in the Eaſt, where prieſts had always been allowed to marry. In like manner, this decree, never having been received here, was of no binding authority. That the words *nolite tangere Chriſtos meos* were not ſpoken by our Saviour, but more than a thouſand years before his time by *David*; and that the "*anointed*" there ſpoken of were the true believers, as contra-diſtinguiſhed from the unbelievers, who at that time were very numerous in Paleſtine. As to the interpretation put on the fifth commandment, they ſaid, that it would be no breach of it for the ſon to arraign his natural or ſpiritual father; and if they ſhould both be convicted, he might commit his ſpiritual father to the ordinary, and reſpite judgment againſt his natural father, and yet be in perfect obedience to the commandment. But admitting, for ſake of argument, that the temporal judge could not juſtify the arraigning his ſpiritual father, the argument would not hold, nor prove that he might not exerciſe the like judicial authority over all other clerks; for every clerk is not his ſpiritual father. However, after all, they ſaid, this commandment was not to be taken in the literal ſenſe here put upon it; but was to receive a reaſonable interpretation according to the ſubject matter.

THESE

CHAP. XXIX.

HENRY VIII.

THESE are ſtated to be the arguments uſed by both ſides in this famous conteſt. Upon theſe the judges gave their opinion; which was, that thoſe of the convocation who had agreed to the citing of Doctor Standiſh, had incurred a *præmunire*. Afterwards, the ſame perſons met at *Baynard's Caſtle*, in the preſence of the king; when cardinal Wolſey, in the name of all the clergy, threw himſelf at the king's feet, and making an humble proteſtation in maintenance of the clergy's claim to exemption in criminal caſes, he conjured the king to ſuſpend his deciſion till the matter had been determined by the Pope. The archbiſhop of Canterbury joined in the ſame prayer. The king ſaid, that they had not anſwered the arguments of Doctor Standiſh; and added with firmneſs, "By the order and "ſufferance of God we are king of England; and the "kings of England who have gone before us never had any "ſuperior but God alone; and therefore know, that we "will maintain the right of our crown and temporal juriſ- "diction, as well in this point as in others, in as ample a "manner as our predeceſſors have done before us. And "as to your decrees, we are well aſſured, that you your- "ſelves of the ſpiritualty act in contradiction to the words "of many of them, as has been ſhewn you by ſome of "our ſpiritual counſel on this occaſion; and beſides that, "you interpret your decrees at your pleaſure; therefore "we will not conform to your will and pleaſure more than "our progenitors have."

The king's determination.

WITH this peremptory declaration of the king the buſineſs concluded. The biſhops promiſed that Doctor Standiſh ſhould be diſcharged from the proceſs inſtituted againſt him; and Doctor Horſey was ſo far reſcued from temporal authority, that having remained in a kind of free cuſtody in the houſe of the archbiſhop of Canterbury till the popular clamour was ſomewhat abated, he ſurrendered himſelf privately to the court of king's bench; and having pleaded

pleaded not guilty to the coroner's inquiſition, the king's attorney confeſſed the plea, and he was diſcharged [o].

THE clergy ſeem, in this inſtance, not to have loſt any part of their wonted felicity in contending with the ſecular power: they appear to have gained a victory in the deciſion, however they might have failed in argument. It is probably to be aſcribed to the zeal of the clergy diſplayed on this occaſion, that a ſtatute founded on good ſenſe, and ſo neceſſary for the public ſecurity, was ſuffered to expire: nor was it till the king had declared hoſtilities againſt the whole papal authority, that the parliament ventured again to abridge the privilege of clergy. This was in the 23d year of his reign, when clergy was taken from murder and robbery in certain circumſtances: but previous to that, two acts were made reſpecting abjuration and ſanctuary, of which it will be neceſſary firſt to take notice.

THE privilege of ſanctuary underwent a like diſcuſſion with that of clergy. On the occaſion of a claim of this ſort, made by the prior of St. John's, the general queſtion of ſanctuary was brought before the council, in 11 Hen. VIII. The king himſelf was there preſent, and expreſſed a doubt, whether it could ever have been the deſign of our antient kings and popes, in their grants of ſanctuary, to give that privilege in caſes of murder and larceny committed out of the ſanctuary *ſub ſpe redeundi*, all which he judged to be an abuſe: he there ſignified his determination that this privilege ſhould be reduced to the compaſs of its original deſign. It ſeems the abbot of Weſtminſter, in conjunction with cardinal Wolſey, had framed an oath to be taken by all ſanctuary-perſons, by which they bound themſelves not to commit treaſon or felony, either within or without the ſanctuary, *ſub ſpe redeundi*: there was however no ſanction to enforce this oath, but ſuch as could be inflicted by the ſpiritual court for perjury. Moſt

[o] Keilw. from 180. b. to 185. b.

places

CHAP. XXIX.

HENRY VIII.

Abjuration and ſanctuary.

places of ſanctuary, therefore, became reſorts for felons, debtors, and delinquents of all ſorts, where they lived at no ſmall expence upon the plunder of the public *.

We ſhall now ſee what was done by the parliament towards reforming the abuſes then complained of. It was endeavoured, by ſtat. 21 Hen. VIII. c. 2. to ſecure the departure out of the kingdom of all abjured perſons. It enacted, that every perſon who had taken ſanctuary for felony or murder, where he ought by law to abjure, ſhould, after his confeſſion, and before his abjuration, be marked, by order of the coroner, with a hot iron, on the brawn of the thumb, with the letter A, that he might be known for an abjured perſon. It was moreover provided, that any felon or murderer who ought to abjure, refuſing to take his paſſage as limited by the coroner, ſhould loſe the benefit of his ſanctuary, and be taken out and committed to priſon, to be dealt with according to law. But the baniſhment of ſo many abjured perſons began now to be thought not the wiſeſt policy; as many able and expert artificers and labourers were thereby furniſhed to foreign countries. A new method of ordering theſe abjured perſons was ſtruck out by ſtat. 22 Hen. VIII. c. 14. which directed the oath of abjuration to be altered; and that, inſtead of abjuring the realm, as before, ſuch an offender "ſhould "abjure from all his *liberty* of this realm, and from his li- "beral and free habitations, reſorts, and paſſages, to and "from the univerſal places of this realm, which ap- "pertained to the liberty of the king's ſubjects unde- "famed:" and having made this abjuration, he was to be directed by the coroner to any ſanctuary within the realm, which the offender ſhould chuſe, there to remain as *a ſanctuary-perſon abjured* during his natural life, and to be burnt in the hand, as directed by the former ſtatute. If he came out of ſuch ſanctuary, he was to ſuffer death as an abjured perſon returning to the kingdom. Such ſanctuary-perſon committing any petit-treaſon, murder, or

* Keilw. 188, &c.

felony,

felony [p], either in or out of ſanctuary, was to loſe all benefit of ſanctuary. Thus was abjuration put upon a new footing; and ſuch offenders as uſed to avail themſelves of this privilege to eſcape puniſhment, were kept hereafter within the reach of the law.

Clergy again taken from certain offenders.

When ſuch proviſion was made for the due confinement of ſanctuary-perſons, a like policy was purſued in regard to thoſe intitled to clergy; and that benefit was alſo taken away in many caſes where it was before enjoyed. This was effected by ſtat. 23 Hen. VIII. c. 1. an act which partly had in view the ſtat. 4 Hen. VIII. c. 2. upon which we have juſt ſaid ſo much; and partly ſome former ſtatutes relating to the purgation of clerks convict. The preamble recites the ſtatute of Weſtminſter 1ſt, ſtat. 3 Ed. I. c. 2. which enjoined biſhops not to deliver clerks indicted of felony without due purgation [q]: and ſtat. 4 Hen. IV. c. 3. [r] which ordained, that perſons convicted of treaſon not againſt the king's perſon, and notorious thieves delivered to the ordinary as clerks convict, ſhould not make purgation, but be ſafely kept in cuſtody, according to a conſtitution provincial to be made, but which never was made: ſince which, the ſtatute complains, it continually happened, that perſons convicted according to law, and committed to the ordinary, "were delivered for cor-"ruption and lucre;" or, "were ſuffered to make their "purgation by ſuch as nothing knew of their miſdeeds." To remedy ſuch abuſes, it was enacted by this ſtatute in the following manner: in the firſt place, clergy was taken away from certain offences; and, in the next place, ſome proviſions were made reſpecting thoſe who were ſtill to enjoy the benefit of clergy; which proviſions were calculated to render that benefit leſs miſchievous than it had been. It was enacted, that no perſon found guilty, after

[p] Vid. ſtat. 33 Hen. VIII. c. 15. the preamble of which gives ſome idea how ſanctuary-perſons lived in thoſe privileged places.

[q] Vid. ant. vol. II. 134.

[r] Vid. ant. vol. III. 240.

the

CHAP. XXIX.

HENRY VIII.

the laws of the land, of petit-treaſon; for wilful murder of malice prepenſed; for robbing of any church, chapel, or other holy places; for robbing of any perſons in their dwelling-houſes or dwelling-place, the owner or dweller in the ſame houſe, his wife, his children, or ſervants then being within, and put in fear and dread by the ſame; or for robbing of any perſon in or near about the highways; for wilful burning of any dwelling-houſes or barns wherein any grain or corn ſhall happen to be; nor their abettors, procurors, helpers, maintainers, or counſellors, ſhall be admitted to the benefit of their clergy, except only ſuch as are within holy orders, that is to ſay, of the orders of ſub-deacon[s] and above.

As to thoſe in the orders of ſub-deacon and above, when delivered to the ordinary as clerks convict of any of the above-mentioned offences, they were in no wiſe to be ſuffered to make their purgation, nor to be ſet at liberty; but to remain in priſon during life, except they found two ſufficient ſureties to be bound for their good abearing. However[t], the ordinary, if he pleaſed, might, by this act, degrade ſuch clerk convict, according to the laws of the church; and ſend him to the king's bench, where judgment of death might be paſſed on him.

By this ſtatute, a ſevere blow was given to the benefit of clergy, and to the perſonal immunity of the clergy in general; for though they were not involved in all the penalty of this act, and their lives were ſpared, when they were guilty of the above offences; yet they were condemned in ſuch caſe to perpetual impriſonment, and even to death, if the ordinary ſo pleaſed to direct. It was in aid of this act that ſtat. 23 Hen. VIII. c. 11. made it felony, without benefit of clergy or ſanctuary, for a clerk convict to break the priſon of the ordinary and eſcape.

[s] Vid. ant. 6. [t] Sect. 6.

Such

SUCH a reformation in the puniſhment of offenders as was made by ſtat. 23 Hen. VIII. c. 1. deſerved every attention and ſupport to render it effectual and complete. But this act, from the terms of it, extended only to ſuch perſons as were *found guilty* after the due courſe of the law; therefore criminals, to prevent their being *ſo* found guilty, would ſtand mute, or by other means prevent a verdict. Again, in caſes where a robbery or burglary was committed in one county, and the thing ſtolen was carried into another, the offender, if found guilty in ſuch *other* county, could not, under this act, be deprived of his clergy; becauſe the jury could not enquire of the robbery or burglary in the firſt county, but only of the larceny in their own. Theſe defects were remedied by ſtat. 25 Hen. VIII. c. 3. which enacts, that all perſons arraigned for any offence mentioned in ſtat. 23 Hen. VIII. c. 1. who ſhall ſtand mute of malice or froward mind, or challenge peremptorily above the number of twenty (to which number felons had been confined by a late ſtatute) [u], or will not anſwer directly to the indictment, ſhall loſe their clergy, in like manner as if they had pleaded and been found guilty. And further, that perſons indicted for ſtealing goods in any county, and found guilty, or who ſtand mute, challenge, or will not anſwer as above deſcribed, ſhall loſe their clergy, in like manner as if found guilty where the robbery or burglary was committed.

THE ſixth chapter of the ſame ſtatute made ſodomy felony; or, as the ſtatute expreſſes it, "the deteſtable "and abominable vice of buggery committed with man-"kind or beaſt." This crime, we have before ſeen, was variouſly puniſhed by our old law [x]; but now it was made a common-law felony, and thoſe who were convicted thereof by verdict, confeſſion, or outlawry, were to ſuffer

[u] 22 Hen. VIII. c. 14.

[x] Vid. ant. vol. II. 352.

death

CHAP. XXIX.

HENRY VIII.

death and forfeiture as felons; and no perſon *offending in any ſuch offence*, was to be admitted to his clergy: which laſt words go further than the former ſtatute in deſcribing the perſons who ſhall loſe their clergy; unleſs they are to be conſidered as reſtricted by the foregoing, which confines the penalty of death and forfeiture to thoſe convicted by verdict, confeſſion, or outlawry. In the next year an act was made [y] to extend the proviſions of the famous ſtat. 23 Hen. VIII. c. 1. to Wales.

CLERGY was taken from offenders in one or more inſtances by other ſtatutes. By ſtat. 27 Hen. VIII. c. 17. clergy and ſanctuary were taken from ſervants embezzling their maſters' goods within ſtat. 21 Hen. VIII. c. 7. After theſe various experiments towards the abolition of clergy, the legiſlature now ventured further, and deprived perſons in holy orders of the exemption with which they were ſtill indulged by ſtat 23 Hen. VIII. c. 1. and other ſtatutes. For it was enacted by ſtat. 28 Hen. VIII. c. 1. that in all offences within ſtat. 23 Hen. VIII. c. 1. ſtat. 25 Hen. VIII. c. 3. and ſtat. 25 Hen. VIII. c. 6. (concerning houſe breakers and other offenders ſtanding mute, and concerning ſodomy), perſons in holy orders ſhall be under the ſame pains and dangers, and be uſed and ordered as perſons not within holy orders: ſo that real clerks were now liable to a capital puniſhment for felony, as well as nominal clerks.

The remaining ſtatutes concerning clergy are ſtat. 33 Hen. VIII. c. 1. and 14. ſtat. 33 Hen. VIII. c. 12. ſect. 26. and ſtat. 37 Hen. VIII. c. 10. which two laſt we ſhall defer for the preſent. The firſt of theſe made it felony to practiſe witchcraft and inchantment, under pretence of diſcovering where ſtolen goods were to be found; and offenders of this kind, being *lawfully convicted*, were to loſe the privilege of clergy and ſanctuary:

[y] Stat. 26 Hen. VIII. c. 12.

ſo

ſo that perſons who ſtood mute, challenged peremptorily above twenty, or would not directly anſwer, were not deprived of clergy by the words of this act. It was on this account that future acts made to take away clergy, were more particular in naming all poſſible inſtances of conviction and trial in which clergy ſhould be loſt, as will be ſeen in the ſtatutes on this ſubject made in ſubſequent reigns.

By ſtat. 33 Hen. VIII. c. 14. perſons making pretended prophecies, grounded upon coats of arms, badges, ſignets, fields, beaſts, letters of names, or other fancies, were declared to be guilty of felony, without benefit of clergy or ſanctuary: a very ſharp law upon the folly and deluſions of mankind; though a fit companion to that which went immediately before. It cannot be denied that both theſe practices might be abuſed to dangerous purpoſes; and, probably, ſome experience of that kind might have juſtified the parliament in contriving ſuch ſevere means of ſuppreſſing them.

Certificates of attainder.

Since the ſtatute of Henry VII. it was proper that a regiſter of clerks convict and attainted ſhould be kept, that ſuch perſons might not have their privilege more than once. For this purpoſe it was enacted by ſtat. 34 and 35 Hen. VIII. c. 14. that the clerk of the crown, of the peace, or of aſſiſe, within forty days, or, if no term, within twenty days after the beginning of the term following the forty days, any attainder, outlawry, or conviction was had, ſhall not only certify a tranſcript, in few words, of the indictment and proceedings, the name of the clerk, with time and place, and certainty of the felony, to the king's bench, there to remain of record; but alſo deliver a tranſcript of the indictment to the ordinary to whom the clerk was committed. The clerk of the crown in the king's bench was to receive them; and upon the requeſt of any juſtice of gaol-delivery, or of the peace, was to certify

CHAP. XXIX.

HENRY VIII.

certify the names of ſuch clerks, with the cauſes of their conviction or attainder.

Sanctuary taken from certain offenders.

HAVING gone through all the ſtatutes that relate to clergy, we ſhall now return to the 26th year of this king, and take a view of the remaining acts about the privilege of ſanctuary. The privilege of ſanctuary was taken from all offenders in high-treaſon, by ſtat. 26 Hen. VIII. c. 13[z]. In the following year a law was made in aid of the regulation which had been lately eſtabliſhed for the due ordering and ſafe cuſtody of ſanctuary-perſons. It was directed by ſtat. 27 Hen. VIII. c. 19. that all perſons privileged in any ſanctuary ſhould wear a badge, and that any perſon who appeared abroad, out of the ſanctuary, without ſuch badge, ſhould immediately loſe his privilege, and be committed to the common gaol. Such perſons were not to appear out of their lodging before ſun-riſing, or after ſun-ſetting, upon pain of impriſonment; and for the third offence they were to loſe their privilege. That the inhabitants of theſe privileged places might not look beyond the limits of their confinement, in any caſe where their neceſſities could be ſupplied within, the governors of ſuch ſanctuaries were empowered to hold plea of debt under 40l. and of treſpaſſes and covenants between privileged perſons and other inhabitants of the ſanctuary.

NOTWITHSTANDING this attempt to regulate the œconomy of ſanctuaries, ſome few years after, it was thought more expedient to aboliſh certain of theſe privileged places; and not to allow thoſe which remained to extend any immunity to offenders of a particular deſcription. It was enacted by ſtat. 32 Hen. VIII. c. 12. generally, that all ſanctuaries, except pariſh-churches and their church-yards, cathedral churches, hoſpitals, and churches collegiate, and all chapels dedicated and uſed as pariſh-churches, ſhould be extinguiſhed and of no effect. But *Wells* in

[z] Sect. 3.

Somerſet-

Somerſetſhire, *Weſtminſter*, *Northampton*, *Norwich*, *York*, *Derby*, *Launceſton*, and *Mancheſter* [a], were ſtill to continue places of ſanctuary. This act was principally occaſioned by the diſſolution of religious houſes, many of which had privilege of ſanctuary; and the ſcites of them would ſtill have enjoyed the ſame privilege, though the ſociety which was to have the direction and government of it no longer exiſted, ſo that great diſorders would probably have enſued, if a like proviſion had not been made.

It was moreover enacted, that the following offenders ſhould no longer enjoy the privilege of ſanctuary in any place whatſoever; namely, thoſe who committed wilful murder, rape, burglary, robbery, in or near the highway, or in a houſe, putting the owner, his wife, children, ſervants, or any other within the ſame in fear of life; thoſe who were guilty of felonious burning of houſes, or barns with corn; robberies of churches, chapels, or other hallowed places with their abettors and procurors; and all thoſe from whom clergy was taken by any of the foregoing laws. Several new regulations were ordained by this act reſpecting ſanctuaries. The chancellor was empowered to appoint commiſſioners to make perambulations, and to ſettle the boundaries of them. Not above twenty perſons were to be admitted at one time into any ſanctuary. Their names were to be called over every day; and if any made default three days together, he was to loſe his privilege.

This was the laſt law made in this reign concerning theſe unhappy objects, who at this period ſeem to, and muſt, from the nature of the thing, have been very numerous, and not to be managed but with great difficulty. The inſtitution itſelf, after all the care of the legiſlature to regulate it, was pregnant with evils, which never could be remedied but by entirely aboliſhing it. The beſt part of the

[a] And inſtead of Mancheſter, *Cheſter*, by ſtat. 33 Hen. VIII. c. 15.

CHAP. XXIX.

HENRY VIII.

laws we have juſt mentioned, was that which took away this privilege from certain offences. Theſe ſomewhat abated the miſchief, till this relick of ſuperſtition was quite deſtroyed in the reign of James I.

It may be thought, that as many of theſe ſtatutes relate to a ſubject which is now no more, a ſhorter account of them would have been ſufficient; but the ſubſtance of them could not well be compreſſed in a ſmaller compaſs; and if they deſerved conſideration in a hiſtory of the changes in our law, they deſerved, at leaſt, to be treated in a manner that would render them intelligible. Indeed, if the conſideration of a ſubſequent revolution was to have weight with the hiſtorian, not only theſe ſtatutes, but moſt of the many criminal regulations, on which we have juſt been ſpending ſo much time, might be conſigned to oblivion. For the ſweeping acts of Edward VI. and queen Mary repealed all the ſtatutes taking away clergy, all thoſe for trying treaſon in a way differing from the courſe of the common law, and all thoſe creating treaſons and felonies; and when theſe were abrogated, what remained to poſterity of the penal laws of Henry VIII.?

CHAP.

CHAP. XXX.

HENRY VIII.

Leaſes for Years and at Will—Leaſes by Tenant for Life, &c.—Of fines—Manner of ſuffering Recoveries—Uſes—A Uſe in Tail—Operation of the Statute of Uſes—Covenants to raiſe a Uſe—A Leaſe and Releaſe—Conſtruction of Wills—The Court of Chancery—Court of Requeſts—Preſident and Council of the North—Action of Covenants—Of Aſſumpſit againſt Executors—Of Trover—Debt and Accompt—The Criminal Law—Of Trials in two Counties—The Eccleſiaſtical Court—King and Government—Bills of Attainder—Torture—Of the Statutes—Of the Year-Books—Fitzherbert—Saint Germain—Raſtell—Printing of Law Books—The Regiſter—Miſcellaneous Facts. 323 to 436

CHAP. XXX. HENRY VIII.

THOUGH our courts, during this reign, furniſhed deciſions upon almoſt every queſtion in the law, we ſhall only ſelect ſuch of them as relate to the new points then moſtly agitated; the alterations made by parliament having taken up too great a ſpace to allow us to enlarge much on this part of our Hiſtory.

MANY queſtions concerning leaſes of various kinds were agitated in this reign, and ſome were adjudged upon ſuch ſufficient grounds, as to ſtand the teſt of future examination without being ſhaken. Of thoſe which were only agitated, but not decided upon, was a doubt upon a very common method of letting lands, whether it ſhould be conſtrued a leaſe for years, or at will: this led to much enquiry

CHAP. XXX.

HENRY VIII.

Leaſes for years and at will.

quiry into the nature of a leaſe at will, and how it differed from a term for years.

In the third year of the king a leaſe came into queſtion, where one had let to another to hold *at his own will*; but it having been long laid down [b], that a leaſe at will muſt be at the will of both parties, it was held by three juſtices in the common-pleas, that this ſhould be conſtrued to be at the will both of the leſſor and leſſee; for if it was at the will of the leſſee, he might keep it, perhaps, for his life, contrary to the rule of law, which ſays no freehold ſhall paſs without livery [c].

But the occaſion when the properties of this ſort of leaſe were thoroughly diſcuſſed was in *Potkyns*'s caſe, in 14 Hen. VIII. A leaſe had been made to him in the 10th year of Henry VII. for term of a year to commence at Michaelmas, and continue till the end of *the ſaid year, and ſo to the next year, de anno in annum*, as long as the parties pleaſed. Theſe were the terms of the leaſe. Potkyns held the land for twenty four years; at the end of that time the leſſor determined the leaſe, and brought an action of waſte: upon which it was moved in arreſt of judgment, that it was only a holding at will, and therefore the defendant was not liable to waſte under the ſtatute. The objection was thus pointed: that the leaſe being only for a year, and beyond that from year to year, as long as the parties pleaſed, the firſt was a leaſe for a year, but the remainder was only at will; for, ſaid they, every leaſe for years ſhould have a certain determination, otherwiſe it is not a leaſe for a *term* of years: and here there is no certain determination, for it is at will; therefore they concluded the firſt to be a good leaſe for a year, and the remainder to be only at will. This point was frequently argued at the bar, and when it came for the court to give judgment, there was as great a difference of opinion among

[b] Vid. ant. vol. III. 336.

[c] 3 Hen. VIII. Keilway 162.

the

the judges; for *Fitzherbert* and *Brooke* held it to be clearly a leaſe at will after the firſt year; but *Pollard* and *Brudnell* the chief juſtice held it to be ſtill a leaſe for a year. As this was a matter of ſome importance, being that upon which it was to depend whether there ſhould be any longer ſuch a deſcription of eſtates as thoſe at will, it may be curious to hear what was ſaid on both ſides.

It was ſaid by *Fitzherbert*, who thought it was an eſtate at will after the firſt year (for there was no doubt about the firſt year), that if it was not a leaſe for years at the commencement, it could not be made ſo by occupation. And in anſwer to what had been urged by the counſel, he ſaid, it was a conceit to contend, that if the party held from year to year at the will of both, the *will* was only to be exerciſed at the commencement of every year: the will certainly extended to every part of the year; ſo that they might determine it at any part thereof. Again, when the counſel had ſaid, that the word *will* was void, he ſaid it was not ſo: but that operated as a ſort of condition; for if I let land for a year *at my will*, the leſſee would aſſuredly have it only at my will. Thus if I let for years, at my will, (but leave *will* out) as a leaſe for a year, and ſo from year to year, without limiting the years; this, for want of a certain determination, could not be a leaſe for years; therefore it muſt follow, that it was a leaſe at will. Again, if a leaſe was made for years generally, without any certain limitation of years, then, in the opinion of ſome, he would have it only two years; for two years would ſatisfy the plural noun in the leaſe: but if it was for twenty years *at will*, this would be determinable at will by either party. The ſtat. Weſtm. 2. expreſsly requires that the leſſee ſhould have ſuch an eſtate as the leſſor could not determine; if a leaſe, therefore, for years was made to commence at ſuch a feaſt, this would not be good, becauſe it wanted the other limitation, when it was to end. The conceit of there being ſeveral leaſes for a year was reprobated equally

by

CHAP. XXX.

HENRY VIII.

by *Brooke*. He ſaid, that a leaſe for years ſhould be perfect by the firſt wording of it, or it was not a leaſe for years: and this, he ſaid, was an entire leaſe and not ſeveral, and the whole commenced at once, notwithſtanding this pretended ſeparation from year to year. Thus, if land was let from Michaelmas next, reſerving rent till the Michaelmas following, and *ſo* the next year, and the third, this was a good leaſe for three years, becauſe the beginning and determination of it was ſufficiently certain, without waiting for any after-circumſtances to explain it.

THE eſtates known in the law were fee-ſimple, fee-tail, for term of life, for term of years, and at will; and each was created by ſpecial words peculiar to itſelf: waſte lay againſt tenant for life and for years by the ſtatute; but tenant at will was at the common law. If a leaſe was made to a man till he was promoted to a benefice, and he had livery, he had an eſtate for term of life: ſo of a leaſe to baron and feme during the coverture; becauſe theſe depended on a condition that had a human determination. Not ſo of other conditions; for a leaſe ſo long as ſuch a tree grew, is but at will; becauſe, ſaid *Brooke*, it is not natural for an eſtate to depend on ſuch a condition. He thought that all eſtates for years ſhould be certain in their determination, and not at the will of any one, for that would be a contrariety; for which reaſon he could not agree with thoſe who ſaid, that *a leaſe for ten years at will*, ſhould be determined at will; for the words *at will* were inconſiſtent and contrary, and therefore were void. He admitted an eſtate for years might be determinable at will, on a condition, but not otherwiſe; as on condition *if ſuch a one is not ſatisfied, or declare his diſſent, then it ſhall ceaſe*. This is a good condition, although only at the will of a ſtranger. He admitted that to be certain in its determination, which could be made ſo by conſtruction of the words creating it. That a leaſe *for years*, he agreed, might be conſtrued good for *two years*, becauſe that ſatisfied the plural term,

and

and was the greateſt certainty that could be obtained out of the words. A leaſe for a thouſand days was good, becauſe it was as certain to count by days as by years. If one leaſed for a year, and ſhewed the commencement of the term, and ſo the ſecond, third, and fourth year, this would be good for four years, becauſe it was ſufficiently certain when it commenced, and when it was to determine; but if it was *from year to year*, there was no certainty at all. Thus a leaſe for years, ſo long as *I. S.* lived, if no livery was made, would be only at will, becauſe by the firſt words of its creation there was an uncertainty of determination; ſo there was no certainty in the firſt words of creation, when a leaſe was *from year to year*; but if it was for *one year, and ſo for the next year, and ſo from year to year*, it would be good for the firſt and ſecond year; but for the others, for want of certainty, it would be only at will. He ſaid, he ſaw no difference between the above leaſe after the firſt two years, and one *for as many years as we can agree*; which, for want of certainty, would clearly be a leaſe only at will. Such were the reaſons given by the two judges who thought this a leaſe at will.

On the other ſide, it was argued by *Pollard*, that conſidering how many leaſes were made in this way, it would be more reaſonable to ſupport it as a leaſe for years; and he thought it a very good leaſe for years. He ſaid, that altho' a leaſe *for years, and ſo from year to year*, would be at will, becauſe it was not determinable upon any certainty; yet, if a leaſe was made *for a year, and* so *from year to year, as long as the parties agreed*, the word *ſo* implied that the leſſee ſhould have the ſubſequent years in the ſame manner as he had the firſt; and it would be a good leaſe for ten or twenty years, if the parties ſo long agreed. The ſame as if the king granted a ward and marriage, and ſo *from ward to ward durante minore ætate*; in which caſe, if the ward died within age, and the next heir was likewiſe within age,

CHAP. XXX.

HENRY VIII.

age, the patentee would have that ward alſo, in the ſame manner he had the firſt. And as it was agreed by the other ſide, that a leaſe for *a year, and ſo for the next*, was good for the next by reference, why ſhould it not alſo be good, if *from year to year?* He ſaid, that if a leaſe was made for ten years at will, the words *at will* would be void; the ſame as in a feoffment in fee, an *habendum* for years would be void. As to the certain determination, he thought it ought to be determinable on a certainty, or on what, though not a certainty at firſt, might become certain; for a leaſe determinable on condition was not intirely certain in its determination. He ſaid, that in caſe of a leaſe from year to year at the will of the parties, when the leſſee entered into any one of the years, neither the leſſor nor the leſſee could determine his will for that year; and if they went on ſo for ten years, it would be an intire leaſe, and not, as ſome ſaid, a ſeveral leaſe every year.

In all this the chief-juſtice *Brudnell* agreed with *Pollard*. He added, that a leaſe for years determinable on an uncertain event, was no uncommon thing. Thus a leaſe for years by an infant might be determined when he came of age; a leaſe by a tenant for life was determinable by his death; a leaſe with proviſo that when the leſſor had a mind to occupy the land, then the leaſe ſhould ceaſe, was held good, though determinable at will. He ſaid a leaſe for three years, and ſo from three years to three years, was a common way of letting parſonages, and theſe were eſteemed good leaſes. Again, a leaſe till the leſſee had levied 10l. of the rents and profits, was a good leaſe; and yet there was no certainty when it ſhould determine: the ſame in this caſe, when the will was determined, then that certainty of determination had taken place, which was marked by the terms of the original creation.

Such were the arguments uſed on both ſides of this famous queſtion, which after all was not determined, tho' they all agreed in giving judgment againſt the plaintiff.

For

For notwithſtanding the leaſe was at an end, as ſtated in the declaration, it was ſtated in the writ, *quem* TENET *ad terminum*, inſtead of *tenuit*; which variance was held fatal; and the principal queſtion was left in its former ſtate, with the addition of all the topics which this ſolemn diſcuſſion had furniſhed on both ſides [d]. In 28 Hen. VIII. a caſe ſimilar to one that had been mentioned by the chief-juſtice, is to be found in *Dyer*. A parſon leaſed his rectory for the term of three years, and after the end of the three years, for another term of three years then immediately next and enſuing; and after the end of that three years, to the end of another three years, during all the term of the natural life of the leſſor: and it was held, by the opinion of moſt of the benchers of the Middle Temple, and ſeveral juſtices of the common-pleas, that the termor ſhould have only an eſtate for nine years, if the leſſor ſo long lived, for it wanted words to make an eſtate for the life of the leſſor; but if it had been, *and ſo from three years to three years*, during the life of the leſſor, this perhaps would have done: and it was ſaid, that for the leſſee to have a leaſe for the life of the rector, he ſhould have livery of ſeiſin [e].

OTHER caſes upon leaſes happened in this reign, which, though of leſs importance than the above, are more worth mention, becauſe they were determined upon and became guides in future times. Theſe not being upon any particular head of enquiry, can be given only in a miſcellaneous way. In 28 Hen. VIII. we find a caſe came before the court, of a leaſe for term of years, with a reſervation of all woods and underwoods; and it was a queſtion, whether an action of waſte would lie againſt the leſſee for cutting trees. It ſeemed to *Baldwin* and *Shelley* that it would not; for the wood being excepted, made no part of the land demiſed, and the ſtatute forbids waſte

[d] 14 Hen. VIII. 10. b. [e] 28 Hen. VIII 8. Dyer, 24. 151.

in

CHAP. XXX.

HENRY VIII.

in terris, boſcis, ſeu gardinis ſibi DIMISSIS. However, they thought there might be a remedy by treſpaſs [f].

THE nature of the poſſeſſion of leſſee for years was agitated in a caſe where the leſſor made a feoffment while the termor was on the land, and in occupation of it: it was doubted whether the feoffee obtained thereby the freehold and rent. *Shelley* thought the feoffment was good, becauſe the termor and the leſſor having diſtinct intereſts, the one a chattel, and the other a freehold, the freehold might well paſs from the one without infringing the right of the other; though it would be otherwiſe, if the new eſtate had been a leaſe for years. But, on the other hand, *Baldwin* and *Fitzherbert* were of opinion, that nothing paſſed by the feoffment, unleſs the termor agreed to it; for the leſſor had no right in the poſſeſſion during the term; and the livery and ſeiſin being nothing but a tranſfer of the poſſeſſion, it could not be made without injury to the termor: they held, therefore, that the common courſe ſhould be adhered to, namely, for the leſſor to grant the reverſion, and the termor to attorn. *Baldwin* added, that if the feoffment was made with the concurrence of the termor, the term and the rent would be gone, for this would be a complete ſurrender: but *Fitzherbert* denied this, for the termor's intereſt could not be ſurrendered without his aſſent; and he quoted ſeveral caſes where it had been held, that the termor's conſent to a livery made by the leſſor was conſiſtent with the continuance of his term. However, after this canvaſs, the point went off without a deciſion [g].

A LEASE was not uncommonly made with a condition by which the leſſee was bound not to alien to a particular perſon. It happened that a leſſee being ſo bound, aliened to one who aliened to the perſon prohibited by the leaſe: it became a queſtion, whether this was a breach of the

[f] 28 Hen. VIII. Dyer, 19. 110.

[g] 28 Hen. VIII. Dyer, 33. 13.

condition;

condition: it ſeems to have been the opinion of *Dyer* that it was not, becauſe every condition ſhould be taken ſtrictly[h]. He likened it to a feoffment on condition that the feoffee ſhould not infeoff *I. S.* and the heir infeoffed *I. S.* which was no breach of the condition. Another caſe of this ſort happened in the court of augmentations. A leaſe had been made for years, on condition that if the leſſee during his life aſſigned his term to another without aſſent of the leſſor, the leſſor might enter. The leſſee deviſed the term without his aſſent; and it was argued that this was a breach of the condition. It ſeemed to *Brooke*, and *Hales*, maſter of the rolls, that this was a forfeiture, for the deviſee ſhall be ſaid to be in of the aſſignment made in the life-time of the leſſee; and they took a difference between an aſſignment made by the law, and by the leſſee himſelf; for they conſidered it as a clear caſe, that had the term been taken by an execution, there would have been no forfeiture. But this, like the former caſe, went off without a deciſion[i].

A LEASE for years was made of land with a ſtock of ſheep upon it, and a rent was reſerved. All the ſheep died, and it was doubted whether the rent ſhould be apportioned. The ground upon which thoſe reſted, who thought it ſhould be apportioned, was, that it was the act of God, without any default in the leſſee. But it was ſaid, that the law was otherwiſe; for if the ſea overflowed the land, or it was burnt with wild-fire, the rent would not be apportioned, but the whole rent ſhould iſſue out of the remainder; though where part was evicted by an elder title, the rent ſhould be apportioned. And of this opinion were *Bromley*, *Portman*, *Hales*, ſerjeants; *Locke*, juſtice; *Brooke*, and others of the Temple; but *Marvyn*, *Browne*, juſtices, *Townſhend*, *Griffith*, and *Foſter*, were of a contrary opinion: though all thought it conſiſtent with rea-

[h] 31 Hen. VIII. Dyer, 45 1.

[i] 32 Hen. VIII. Dyer, 45. 3.

ſon

CHAP. XXX.

HENRY VIII.

ſon and equity that the rent ſhould be apportioned. This caſe was afterwards made the ſubject of a *reading* in one of the inns of court, as was very common in thoſe days; and there it was the opinion of *More* the reader, together with *Brooke*, *Hadley*, *Forteſcue*, and *Browne*, juſtices, that the rent ſhould be apportioned [k].

No little debate, nor ſmall difference of opinion, aroſe upon the effect of leaſes made by tenants for life and other tenants, who tho' poſſeſſed of a greater eſtate than for their own lives, yet could not make leaſes that extended beyond that period, without infringing the claims and titles of thoſe who followed them; all which ſhewed the need there was for the parliament to take up the ſubject, and make ſome ſpecific declaration thereon, as was actually done in this reign [l].

Leaſes by tenant for life, &c.

We find it laid down by *Fitzjames*, chief-juſtice of the king's bench, in 24th year of the king, with the concurrence of many others, that if a tenant for life leaſed land for years, and died, the leaſe became void, and the rent determined: the ſame of a parſon's leaſe; and though his ſucceſſor received the rent, the leaſe was not good againſt him; for being void by the death of the leſſor, it could not be perfected by any acceptance or ratification [m]. In a ſubſequent caſe, we find a difference made between a leaſe for years and for life; for after recogniſing the foregoing opinion, it was ſaid, that if a parſon made a leaſe for life, and died, and his ſucceſſor accepted fealty, he ſhould be bound by it during his life [n]. In the caſe of a leaſe for years, made by the biſhop of London, reſerving rent to him and his ſucceſſors, it was argued, whether it was void by the biſhop's death; and it was held by many that it was: though it was agreed, ſays Dyer, that an abbot, biſhop, or thoſe who have an

[k] 35 Hen. VIII. Dyer, 56. 15.
[l] Vid. ant.
[m] 24 Hen. VIII. New Caſes, 152.
[n] 32 Hen. VIII. New Caſes, 151.

eſtate

eſtate of inheritance, as tenants in tail, might make a leaſe for years rendering rent; and it would not be void by their death, but voidable only at the pleaſure of their ſucceſſor, or the iſſue; for if they accepted the rent, the leaſe would be good. But they adhered to the former opinion, that in the caſe of a parſon, or tenant for life, ſuch leaſe would be abſolutely void[o]: and ſo it was again held, in the caſe of a parſon's leaſe, in 38 Hen. VIII[p].

WITH regard to leaſes by tenant in tail, it was held by the juſtices of both benches, where *ceſtui que uſe* in tail and his feoffees made a leaſe for years, and died, and the iſſue aliened the land by fine, before he had made any entry upon the termor, or received any rent, and the alienee accepted the rent; they held, that the alienee could not have avoided the leaſe, even if he had not accepted the rent[q]; and that it could not be avoided without entry by the iſſue.

A METHOD had been contrived, by which tenant in tail could make a leaſe for years that would be good againſt the iſſue. The tenant in tail and the intended leſſee would acknowledge the land to be the right of *A.* a ſtranger; and then *A.* would, by the ſame fine, grant and render to the leſſee for years, with remainder to the leſſor and his heirs[r]. This device is mentioned in a caſe in 36th of the king, which was four years after the *enabling act*, and the ſtatute which made a *fine* a bar to the iſſue. As, therefore, before the one of thoſe acts, a leaſe let in this way would not bind the iſſue; and after the other, the tenant was by law enabled to let under certain terms; ſo this contrivance ſeems to be neceſſary, ſince thoſe acts, in caſes where it was intended to grant a leaſe of longer date than twenty-one years, or three lives; or not within the other terms of the enabling act.

[o] 32 Hen. VIII. Dyer, 46. 9.
[p] New Caſes, 154.
[q] 33 Hen. VIII. Dyer, 51. 17.
[r] 36 Hen. VIII. New Caſes, 142.

CHAP. XXX.

HENRY VIII.

IT was moſtly in conjunction with the preſent faſhionable conveyances, that topics of real property were agitated in the courts; a fine, a recovery, a deed to raiſe or convey uſes, or a will, was uſually the occaſion upon which any litigation of this ſort aroſe. To acquaint ourſelves, therefore, more intimately with the learning of real property in this reign, we ſhall now proceed to conſider the methods in which it was moſt commonly transferred. Firſt, of fines and recoveries.

SOME queſtions upon the nature of fines and recoveries were agitated in our courts, and deſerve not leſs attention than the ſtatutes which have already been mentioned reſpecting thoſe two methods of conveying lands and hereditaments.

Of fines.

IN the 19th of the king, a very important queſtion (which has already been alluded to [s]) was agitated, upon the effect of this ſtatute of fines. A tenant in tail had levied a fine with proclamations; and the five years paſſed in his life-time: he died, and it was made a queſtion, whether his iſſue ſhould be barred? This was argued at Serjeant's-inn before all the juſtices, who were divided in opinion. *Engleſield*, *Shelley*, and *Coningeſby*, thought that the iſſue ſhould not be barred; for they ſaid, that by ſtat. 4 Hen. VII. c. 24. a fine was to conclude both privies and ſtrangers, with certain ſavings; namely, to all perſons and their heirs (other than the parties to the fine), their right and intereſt which they had at the day the fine was engroſſed, ſo that they brought their action, or made their entry, within five years after the ingroſſing; ſaving alſo, to all other perſons, ſuch right, title, and intereſt, as would firſt grow, remain, deſcend, or come to them after the fine engroſſed, or proclamation made, by force of any entail, or other cauſe or matter done before the levying of the fine. They contended, by this laſt ſav-

[s] Vid. ant. 239.

ing

ing the iſſue in tail were aided; for they are the firſt to whom a right would deſcend after the engroſſing of the fine: and though the father was privy to the fine, yet the iſſue is neither party nor jury; for he claims by the donor, and not by the donee, notwithſtanding he muſt convey himſelf to the land by the father. For, they ſaid, it was not like where a father diſſeiſed a grandfather of his land in fee, and levied a fine: then the grandfather dies, and afterwards the father; in which caſe the fine would bar the ſon, becauſe he could not convey the fee-ſimple to himſelf but through the father, who was party to the fine, and therefore as heir to him he was privy to the fine.

THE juſtices on the other ſide were *Fitzjames*, *Brudnell*, *Fitzherbert*, *Brooke*, and *More*. They ſaid, that the intent of the makers of the ſtatute, as appears by the words of it, was, that a fine ſhould be at an end, and ſhould conclude as well privies as ſtrangers; and if no exception had been made in the above words, all perſons, as well the iſſue in tail as others, would be concluded. As to the exceptions, they ſaid, in the firſt there was no aid given but to femes covert; in the ſecond, all ſtrangers are aided who had title to the land at the time of the fine levied, if they brought their action, or made their entry within five years; but the iſſue are not aided by either of theſe two exceptions. The third ſaving is in favour of all other perſons, which muſt be intended all ſtrangers to the fine, and not privies; and by virtue of that ſaving, all ſtrangers to a fine, to whom a remainder in tail, or a deſcent in tail, ſhall firſt accrue after the ingroſſment, ſhall be aided. Thus if tenant in tail diſcontinued, and the diſcontinuee levied a fine with proclamations, and the five years paſſed, and then the tenant in tail died, the iſſue might have another five years, by virtue of that ſaving in the act. The intention of the makers was not that he who claimed by the ſame title as his anceſtor who levied

the

CHAP. XXX.

HENRY VIII.

the fine, ſhould be aided; for ſuch iſſue in tail is privy to his anceſtor by whom he is to make his deſcent, and all privies are clearly concluded by ſuch a fine: they therefore were of opinion, that the iſſue in tail were barred by ſuch fine. All the juſtices agreed, that if a ſtranger to a fine, to whom a remainder in tail or other title firſt accrued after the fine, did not make his claim within five years, his iſſue would be barred for ever [t]. This, no doubt, became the governing opinion on the ſtat. 4 Hen. VII. till, to remove all difference of ſentiment, it was ſo declared by ſtat. 32 Hen. VIII. as has been before ſhewn.

THERE is nothing further in the books of importance on the ſubject of fines, till the 27th year of the king; when we find a caſe, where a fine had been levied *ſur grant et rendre*; in which the conuſee granted to the conuſor the lands in tail, on condition that he and his heirs carried the ſtandard of the conuſee, when he went to battle; and if he or his heirs failed therein, then the land ſhould remain to a ſtranger. Upon its being put to the court, whether this was a good remainder, *Fitzherbert* ſaid, he had never before ſeen a fine levied upon condition; and though he thought ſuch a fine clearly good when levied, he doubted whether the juſtices would be willing to take ſuch, becauſe it was a very old language in the law books, that *finis finem litibus imponit*; which ſeemed to him not much promoted by ſuch conditions. As to the remainder, he thought it good; and that the ſtranger took it before the condition broken: and when it was objected that the remainder, as it depended on a condition, could not take effect till the condition was broken, he maintained what he had firſt ſaid; but had it been a feoffment, he ſaid, that if the remainder did not take effect at the time *livery* was made, it could not afterwards. However, no judgment was given [u].

[t] 19 Hen. VIII. Dyer, 2, 1. [u] 27 Hen. VIII. 24.

IT

It was a common practice to make a leaſe for term of years by fine. The courſe was, firſt for the leſſee to acknowledge the land to belong to the leſſor, *come ceo*, &c. and then for the leſſor to grant and render it to the leſſee [x]. The fine *ſur grant et rendre* was a uſeful aſſurance in theſe and many other caſes. Where it was covenanted, that *A.* ſhould make to *B.* his wife, daughter of *J. K.* a jointure by fine, it was contrived, on account of the infancy of *B.* that the writ of covenant ſhould be made between *J.* and *A.* by which *A.* acknowledged the land to be the right of *J.* *come ceo que*, &c. and *J.* granted and rendered it to *A.* for life, without impeachment of waſte, with remainder to *B.* his wife, for life, remainder to *A.* and his heirs [y]. What effect a fine had on an eſtate *in uſe*, will be mentioned in another place.

Manner of ſuffering recoveries.

The modern method of ordering a recovery, ſo as to make it a complete bar to all ſecret intails, and to thoſe claiming in remainder, was not generally practiſed in this reign. They often contented themſelves with a ſingle voucher; and they brought the writ againſt the tenant whoſe eſtate was to be barred; both which were the preciſe circumſtances in *Taltarum*'s caſe: and though that deciſion ſeemed a ſufficient warning, they continued more commonly to ſuffer a recovery in that way, than in any other. In the twenty-third of the king we find a writ of entry brought againſt the huſband and wife of land, where the wife was tenant in tail, and they vouched over: this was held a bar to the iſſue in tail [z]. Yet it was ſaid, on another occaſion, that if the huſband ſurvived the wife, then as the recompence would go to the ſurvivor, this ſhould not bar the iſſue [a]. It was held, that where the writ was brought againſt the tenant for life, in order to bind the fee-ſimple, he ought to pray in aid of him in reverſion, and they were then to vouch together [b]. It was

[x] New Caſes, 142.
[y] 30 Hen. VIII. New Caſes, 139.
[z] 23 Hen. VIII. New Caſes, 250.
[a] 25 Hen. 8. New Caſes, 251.
[b] Ibid.

CHAP. XXX.

HENRY VIII.

held in 25 Hen. VIII. (which was before the ſtatute for declaring void recoveries ſuffered by tenant for life), that if a tenant for life vouched a ſtranger, and the demandant recovered, and the tenant over in value, that the land recovered in value would not go to the reverſioner after the death of the tenant for life; ſo that, in all reaſon, ſuch recovery ought not to be a bar to the perſon in reverſion [c].

In another caſe, about five years after, it was ſaid, that where there was tenant for life, and he was impleaded, and vouched him in remainder in tail, or for life, who vouched over one who had title of formedon, and ſo the recovery was had; there the iſſue of him who had title of formedon, might bring his formedon, and recover againſt the tenant for life; for the ſuppoſed recompence ſhould not go to the tenant for life, becauſe the anceſtor warranted only the remainder (ſays the report), and not the eſtate for term of life, and therefore, the tenant for life, who was not warranted by the anceſtor, could not bind him by the recovery. In ſuch caſe, it was recommended, that the tenant for life ſhould pray in aid of him in remainder, and they ſhould join and vouch him who had title of formedon; and if the recovery was paſſed in that manner, the recompence would go to both [d].

Where there was a tenant for life with remainder over, or tenant in tail, the remainder over, and he was impleaded, and vouched over a ſtranger, and the recovery was had in that manner; it was held by *Montague*, juſtice, and others, that this would bind the entail, for the recompence would go to him in remainder. It is remarked upon this caſe, by *Brooke*, that the law was determined to be otherwiſe, by all the juſtices, in the caſe of *Lord Zouch* and *Stowell* in chancery, and he thought the reaſon was this: That when he vouched a ſtranger, the

[c] 25 Hen. VIII. New Caſes, 251. [d] 30 Hen. VIII. New Caſes, 252.

recompence

recompence ſhould not go to him in remainder; though it would be otherwiſe, if he vouched the donor or his heir [e].

NOTWITHSTANDING theſe diſcordant opinions about the manner of ordering a recovery, it is evident, that ſome recoveries were ſuffered in the preciſe way we now ſee them; for ſo early as the twenty-third of this king it was laid down, that a recovery with ſingle voucher only gave the eſtate which the tenant in tail had at the time of the recovery; ſo that if he was in of another eſtate, then the entail would not be bound againſt the heir: it was therefore recommended to ſuffer the recovery with *double voucher* [f]. The way to effect this was, for the tenant in tail to diſcontinue his eſtate, by making a freehold to ſomebody againſt whom the *præcipe* might be brought; that perſon being tenant of the land, and alſo to the writ of *præcipe* would vouch the tenant in tail, who would vouch over ſome ſtranger, called the *common vouchee*, and ſo loſe the land. Here, as the tenant in tail vouched *generally*, and the ſtranger entered with the warranty *generally*, the recompence would be held to enſue the general warranty; in conſequence of which the tenant in tail, and all perſons claiming through him, under whatever eſtate, would be barred; it being in the power of none to ſay, the warranty was annexed to ſome other eſtate, and not to that which he claimed. Thus was a recovery ſettled upon the principle of *Taltarum*'s caſe, as a complete bar to all eſtates that the tenant could claim.

THE following queſtion aroſe upon a recovery. A writ of entry was brought againſt a tenant in tail; there was a voucher and recovery in value againſt the common vouchee; but before execution ſued, the tenant in tail died, and the iſſue entered; it was ſubmitted to the court, whether the recoveror might not enter; and it ſeemed to *Fitzherbert* and *Baldwin* that he might well enter; for the iſſue, on

[e] 27 Hen. VIII. New Caſes, 252. [f] 23 Hen. VIII. New Caſes, 270.

CHAP. XXX.

HENRY VIII.

account of the recovery over in value, could not falsify the recovery, as he might if there had been no recovery over in value. But *Shelley* thought the issue were remitted by the death of the tenant. After the delivery of these two opinions, the matter went off without a decision [g]; and so the question remained, till it was solemnly settled in the reign of queen Elizabeth. Another question of difficulty respecting a recovery, and also a fine, was put to the court of common-pleas, but received no decision. It was asked, if a tenant in tail, the reversion in the king, levied a fine or suffered a recovery, the heir would be barred. The court seemed to think that the heir would be barred, though it was no discontinuance of the entail, nor had any effect as against the king in reversion. *Englefield* said, he had before met with such a case, and, upon good advice, it had been thought a bar (by which it may be supposed he meant a bar to the king, for the report had before said that they had *all* agreed upon its being a bar to the issue); but *Shelley* expressed a doubt of it. Whether it was one or the other, we have already seen, that this difficulty was removed about three years after by statute [h].

Uses.

THE law and doctrine of uses constituted one of the principal subjects of discussion during the whole of this reign; and so unsettled were men's minds upon the nature and qualities of this new sort of property, that questions of this kind were agitated with great difference of opinion. To convey to the reader an idea of this controversy about uses, it may perhaps be the best way to state the cases that appear on this head in our books, in the order in which they happened; as this will more readily exhibit the progress of opinions.

A CASE happened, in the 14th year of the king, where it was necessary to enter fully into the nature of uses. The

[g] 29 Hen. VIII. Dyer 35, 28. [h] 28 and 29. Hen. VIII. Dyer 32. Vid. ant. 239.

feoffees

feoffees had granted a rent to a perſon who was appriſed of the uſe, and afterwards made a feoffment thereof, and the *ceſtui qui uſe* releaſed all his right to the feoffee; the grantee diſtrained for the rent, and it became a queſtion, whether the rent ſhould be conſidered as to the uſe of the *ceſtui que uſe*, as the land was, or to the uſe of the grantee. It was maintained by *Pollard*, *Brooke*, and *Fitzherbert*, juſtices, that the rent ſhould be to the uſe of *ceſtui que uſe*, and then the releaſe of the *ceſtui que uſe* to the feoffee extinguiſhed it by ſtat. 1 Ric. III. which allows the releaſe of *ceſtui que uſe* to be good againſt him, his heirs, his feoffees and their heirs: they held likewiſe, where a feoffment to a uſe was made, that the heir of the feoffee and his feoffee, and all perſons who were in in the *per*, without conſideration (or upon conſideration, if they had notice of the firſt uſe), ſhould be ſeiſed to the ſame uſe; but otherwiſe of thoſe who came in in the *poſt*. For it was ſaid by *Newdigate*, ſerjeant, if feoffees to a uſe die without heirs, and the lord enters by eſcheat, he ſhould be ſeiſed to his own uſe. Again, if the heir of the feoffee was within age, he ſhould be in ward to the lord, and the lord have the profits, and the feoffee's wife her dower to her own uſe; her's being an eſtate given her by law, though ſhe is ſaid to be in by her baron. The huſband of a woman ſeiſed to a uſe ſhould likewiſe be tenant by the courteſy, and be conſidered as in in the *poſt*, to his own uſe. Again, if the feoffee to a uſe was bound in a ſtatute-merchant, the land was liable to be taken in execution. The feoffees might grant offices, as that of a ſteward, bailiff, receivor, and the like.

But *Fitzherbert* ſaid, that if a man made a feoffment without conſideration, the feoffee ſhould be ſeiſed to the uſe of the feoffor, or to the ſame uſe to which the feoffor was ſeiſed; and if a feoffee was ſeiſed of a ſeignory to a uſe, and land eſcheated, he ſhould have the eſcheat to the ſame uſe as the ſeignory. Again, if the feoffee of a ſeignory recovered in value upon a voucher, it was to the firſt uſe. To this

CHAP. XXX.

HENRY VIII.

this *Pollard* agreed, and *Brooke* admitting that the wife of the feoffee ſhould be endowed to her own, if ſhe took her dower at common law, thought it would be otherwiſe, if it was dower *ex aſſenſu patris*, or *ad oſtium eccleſiæ*; for in ſuch caſes ſhe would be in by the feoffee; but the other was in by the law, as well as *per le baron*, and indeed without any act of her own. If a feoffee made a gift in tail, without ſpecifying any uſe, he thought the donee ſhould be ſeiſed to his own uſe; for here was a conſideration, namely, a tenure between them, unleſs a uſe was ſpecially expreſſed at the time of the gift: ſo in a deviſe by will, the uſe would be to the deviſee, unleſs otherwiſe expreſſed, becauſe there was a conſideration implied: ſo a feoffment to a corporation or abbey would be to their own uſe, unleſs otherwiſe expreſſed. There ſeemed to be no doubt of what was laid down about conſiderations and notice; but they all agreed in it very fully, namely, that a feoffment by feoffees to a uſe without conſideration, was to the firſt uſe, if upon conſideration; if to one who had no notice of the uſe, the uſe was changed, and, of courſe, if with notice and conſideration, the firſt uſe remained. *Brudnell*, the chief juſtice, carried the rule about feoffments by feoffees ſtill further; for he ſaid, ſhould the feoffees make a leaſe for life, with remainder for life, remainder in fee, to perſons who had notice of the uſe, they ſhould be ſeiſed to the firſt uſe, notwithſtanding the diviſion of eſtates. All this was agreed in by the judges as to the nature of uſes, and the eſtate and power of feoffees to a uſe; but upon the main queſtion they differed, all of them but *Brudnell* holding the rent void, becauſe a man could not have a uſe and a rent out of the ſame land[1].

WHEN a feoffment was made to uſes that were declared by deed, this, like other grants, was not to be revoked; and any charge upon or diſpoſal of the land contrary to the tenor of ſuch uſes already declared, were utterly void. However, as a will differed ſo diametrically from a deed,

[1] Hen. VIII. 4.

that

that every later was a legal abrogation of the former, ſo uſes declared by will might be revoked and changed as often as the teſtator pleaſed. It happened that a perſon made a feoffment to the uſe of his will, and added *prout in hoc ſcripto*, namely, to the uſe of *B.* for life, and ſo on; afterwards he made a leaſe for years, and died; and it being a queſtion whether this leaſe was good, it was held by the court, that, notwithſtanding the words *prout in hoc ſcripto*, this was clearly a feoffment to the uſe of the laſt will, which might be changed in part, or in the whole, and therefore the leaſe was a revocation *pro tanto*. They added, if a feoffment was made to the uſe of a ſchedule annexed, and that ſchedule was made in the form of a will, it might be altered as a will might [k].

A uſe in tail.

THE queſtion, whether *ceſtui que uſe* in tail had any power to alien under ſtat. 1 Rich. III. was again agitated [l], and was argued before all the judges in Serjeant's-inn. The queſtion was ſtated, whether if ſuch a perſon made a leaſe or feoffment, or ſuffered a recovery, the iſſue and the feoffee ſhould be bound by it after his death. The judges were divided in opinion: *Fitzjames*, *Norwiche*, *Fitzherbert*, *Liſter*, chief baron, and *Port*, held that it would not bind the feoffees; becauſe the ſtatute makes ſuch gifts and grants good againſt the grantor and his heir, claiming as heir to the grantor; but claiming as *heir of the body*, they ſaid, was different from claiming as *heir*. For if feoffees were ſeiſed to the uſe of *B.* for life, remainder to the uſe of *C.* and his heirs, and *C.* was heir apparent to *B.* and afterwards *B.* made a feoffment, or ſuffered a recovery, this would not bind the feoffees after the death of *B.*; becauſe he claimed as purchaſor, and not as heir. They ſaid, every feoffee who claimed to a uſe in tail, did not claim to the uſe of the feoffor and his heirs, as the ſtatute of Rich. III. expreſsly required, but to the uſe of

[k] 19 Hen. VIII. 11.

[l] Vid. ant. 160.

the

CHAP. XXX.

HENRY VIII.

the iſſue in tail; and they vouched an authority in the laſt reign [l], which declared that the feoffment of *ceſtui que uſe* in tail did not bind the iſſue after his death. In the caſe of a feoffment to the uſe of an abbot, the feoffees were ſeiſed to the uſe of him and his ſucceſſors, and not to the uſe of him and his heirs, ſo that a feoffment by the abbot would not be good.

However, *Engleſield*, *Spelman*, and *Shelley*, were of a different opinion. They ſaid, that before the ſtatute *de donis* every tenant in tail *poſt prolem ſuſcitatam* had power to alien, in ſpite of the donor and his heirs, ſo that he had in effect a fee-ſimple; and all that this ſtatute did, was to reſtrain the donee and his heirs from aliening. But in the caſe in queſtion, there was no gift *of land* in tail; the land was given to the feoffees in fee-ſimple, and the uſe, though called a uſe in tail, was in truth no tail within the ſtatute, and was therefore at common law, as land *poſt prolem ſuſcitatam*; any alienation therefore by *ceſtui que uſe* in tail, after iſſue, ought to bind the feoffees. They argued, that the ſtat. of Rich. III. would become of no effect, if feoffees could invalidate ſuch grants after the death of *ceſtui que uſe*. It was, however, agreed by the majority, that a grant, feoffment, leaſe, or releaſe, by *ceſtui que uſe* in tail, could not bar the feoffees [m]; and they thought the ſame of a recovery.

However people might acquieſce in the above deciſion, as far as it affected voluntary grants by deed, or acts *in pais*, they would not endure that a recovery, which had lately been recognized as a bar to an eſtate-tail in poſſeſſion, ſhould not be allowed the ſame force when applied to the like eſtate in uſe. This point was frequently agitated in this reign, both before and after the ſtatute of uſes, and with different ſucceſs. It appeared in two ſhapes; either

[l] 4 Hen. VII. 17. [m] 19 Hen. VIII. 13.

where

where the recovery was ſuffered by the tenant, or by the feoffees. The following caſe of this kind was after the ſtatute.

In the twenty-ninth year of the king it was held, that if the feoffees to the uſe of an eſtate-tail, or other uſe, ſuffered a recovery upon a bargain, this ſhould bind the feoffees and their heirs, and *ceſtui que uſe* and his heirs, where the buyer and recoveror had no notice of the firſt uſe. To this it was added by *Fitzherbert* (who had, as we have ſeen, concurred in diſallowing a recovery by tenant in tail himſelf) that it ſhould bind, though he had notice of the uſe; for the feoffees having the fee-ſimple, might by law ſuffer a recovery. It was at the ſame time held by many (among whom it cannot be ſuppoſed *Fitzherbert* was one), that if *ceſtui que uſe* in tail was vouched in a recovery, it ſhould bind the tail in uſe, both as to the tenant and his heirs; which opinion was founded, as *Brooke* thinks, upon the authority of ſtat. Rich. III. [n] and, moſt probably, upon the reaſoning of the diſſenting judges in the caſe beforementioned, in the nineteenth of the king. We find, in the next year, a doubt was entertained whether a recovery againſt *ceſtui que uſe* in tail would bind the iſſue; and it is ſaid by *Hales*, juſtice, that true it is, by ſuch recovery, the entry of the feoffees is taken away; but after the death of the tenant, the feoffees may have a writ of right, or writ of entry *ad terminum qui præteriit* in the *poſt*, or the like writ. It was queſtioned, in anſwer to the above reaſoning about the ſtatute *de donis*, whether a uſe might not be within the equity of that act; and they reaſoned upon the ſtatute of Rich. III. juſt in the way that the judges who concurred in the deciſion in the nineteenth of the king had treated it [o]. The ſame year another recovery of this kind came in queſtion; and this recovery, as we are told, had been adviſed by *Fitz*, ſerjeant. It does not appear whether that was *Fitzherbert*,

[n] 29 Hen. VIII. New Caſes, 129. [o] 30 Hen. VIII. New Caſes, 131.

who

CHAP. XXX.

HENRY VIII.

who we have ſeen thought, when upon the bench, ſuch recoveries void. It happened in this caſe, that the tenant in tail died without iſſue, and the brother claiming the eſtate in chancery, the recovery was held to be good no longer than the life of the recoveree [p]. Thus ſtood this queſtion at the cloſe of the reign of Henry VIII.

FITZHERBERT ſeems not to have been always governed by the ſame general principles upon this ſubject; for, notwithſtanding a fine levied by *ceſtui que uſe* in tail ſtands exactly upon the ſame grounds with a recovery, he gave a clear and explicit opinion in the twenty-ſeventh year of the king, that ſuch a fine was good. The caſe in which he delivered this opinion is worth mentioning for another reaſon: *ceſtui que uſe* to him and his wife, and the heirs of the body of the huſband, bargained and ſold his land for ſo much money, and then he and his wife levied a fine to a ſtranger. It was ſaid this fine was void, for at the time of levying it, the parties had nothing either in uſe or in poſſeſſion; for by the bargain and ſale, the uſe was in the bargainee, and nothing was either in the huſband, the wife, or the ſtranger, ſo that the fine could no way be valid. *Fitzherbert*, obſerved upon this, that he would never buy land, unleſs the *ceſtui que uſe* made firſt a feoffment, and afterwards levied a fine [q]. In the thirtieth year of the king, it was rather thought, that a fine levied by *ceſtui que uſe*, though it bound him and his heirs, ſhould not bind him in reverſion, nor the feoffees, after the death of the conuſor; for under the ſtat. 1 Rich. III. only he and his heirs, and his feoffees, claiming to his uſe, were to be barred, which was not ſo here. This doubt, as to the iſſue in tail, was ſettled by ſtat. 32 Hen. VIII. c. 36. as we have before [r] related.

To return from recoveries and fines ſuffered by *ceſtui que uſe* in tail to the nature of uſes in general. In the

[p] 30 Hen. VIII. New Caſes, 135. [q] 27 Hen. VIII. 20. b. [r] Vid. ant. 239.

twenty-

twenty-fourth of the king, we find a caſe where a man had made a feoffment in fee to four perſons to his own uſe, and the feoffees made a gift in tail without conſideration to a ſtranger, who had no notice of the firſt uſe, *habendum* in tail to the uſe of *ceſtui que uſe* and his heirs. On a former occaſion we met with a *dictum* declaring ſuch eſtate in tail to be good; and it was now accordingly adjudged, by the concurring opinion of all the judges[f], that the tenant in tail ſhould not be ſeiſed to the firſt uſe, but to his own. They ſaid, that the ſtatute *de donis* ordains, *quòd voluntas donatoris in omnibus obſervetur.* Now no one can be ſeiſed to the uſe of another, but one who can execute an eſtate to the *ceſtui que uſe*, which tenant in tail cannot do; for if he was, the iſſue might have a formedon, to recover the eſtate according to the will of the donor. The ſame of an abbot, mayor and commonalty, and other corporations, as was before ſaid; for if an abbot executed an eſtate, his ſucceſſor might have a writ of entry *ſine aſſenſu capituli.* The ſame of ſuch as were in the *poſt*, as thoſe by eſcheat, mortmain, perquiſite of a villain, recovery, dower, tenant by the curteſy, and the like, who were always ſeiſed to their own uſe. They repeated what had been ſaid on a former occaſion, that there was a tenure between the donor and donee, which raiſed a conſideration, and therefore intitled the tenant in tail to be ſeiſed to his own uſe. The ſame, they ſaid, of a tenant for term of life and years; for where fealty was due, and a rent was reſerved, there, though an uſe was abſolutely expreſſed to the donor or leſſor, yet thoſe circumſtances were conſtrued to amount to ſuch a conſideration, that the donee or leſſee ſhould have the land to their own uſe. The ſame where a man ſold his lands for 20l. by indenture, and executed an eſtate to his own uſe, this would be a void uſe; for the law upon the conſideration of money conſtrues the land to be in the vendee.

[f] 27 Hen. VIII. 10.

CHAP. XXX.

HENRY VIII.

It is laid down by *Fitzherbert*, that ſhould the feoffees to the uſe of an eſtate-tail ſell the land to one who had notice of the uſe, the buyer ſhould be ſeiſed to his own uſe, and not to the uſe of the eſtate-tail; and this, becauſe of the conſideration of money; and becauſe the feoffees, having a fee-ſimple, could make a good common-law conveyance [1].

THE notion of tenure being a conſideration ſufficient to raiſe a uſe, they carried ſtill further. They ſaid, that uſes were at common law before the ſtatute *quia emptores*; for, before that act, upon every feoffment there was a tenure between the feoffor and feoffee, which was ſuch a conſideration as intitled the feoffee to be ſeiſed to his own uſe: but after that act, every feoffee was to hold *de capitali domino fœdi*; ſo that there was no conſideration between the feoffor and feoffee without money paid, or other ſpecial matter, in conſideration of which the feoffee might become entitled to be ſeiſed to his own uſe. For, according to the opinion of *Shelley*, when the father infeoffed the ſon and heir-apparent (as was common in the reign of Henry III. before ſtat. Marlb [u].) to defraud the lord of his ward, this feoffment was to the uſe of the father who took the profits during his life. The ſame, in caſe of a feoffment made by a woman to a man to marry her; the woman took the profits after the eſpouſals; though this might be doubted, as *Brooke* thinks, becauſe there was an expreſs conſideration. Again, it was held by *Norwiche*, if a man delivered money to *T. S.* to buy land for him, but he bought the land to his own uſe; yet this would be conſtrued by law to be to the uſe of him who delivered the money [x].

AFTER all this debate upon the nature of uſes, and when they had been recogniſed both by parliament and the courts for many years, a very ſingular attack was

[1] New Caſes, 136. [u] Vid. ant. vol. II. 62. [x] 24 Hen. VIII. New Caſes, 126.

made

made upon them by the counſel of the crown. This was, no doubt, at the inſtigation of Henry VIII. who had frequently expreſſed his diſapprobation of uſes; and, after long complaint of the loſs he ſuffered in wardſhips, and other caſualties of tenure, had propoſed plans for curtailing them, which had not yet ſucceeded. He ſeems, this year, to have attacked them both in Weſtminſter-hall and in parliament. The caſe alluded to aroſe upon the will of the lord Dacres; a family which, at this time, by one accident or other, gave occaſion to the diſcuſſion of ſeveral points of law. The ſtat. 4 Hen. VII. which was one of the ſtatutes of pernors of profits, and ſecured to lords the wardſhip of ſuch heirs as were ſeiſed only of the uſe, and not in poſſeſſion, had an exception in favour of appointments by the anceſtor's laſt will. The lord Dacres, by his will, had authoriſed his feoffees to pay his debts; after which he limited his eſtate to his ſon in tail, the remainder over in fee. An office was found declaring all this, and ſuggeſting, that the will was made by covin and colluſion. This being returned into chancery, it was there litigated by the feoffees before the chancellor and all the judges of England. It was contended, in ſupport of the inquiſition, firſt, that a uſe was not at common law: ſecondly, that it was not teſtamentary; thirdly, that the preſent will was covinous. In ſupport of the firſt poſition, they ſeemed to adduce nothing to ſhew that this ſort of property was not at common law, but merely that there was no mention of it before the time of memory in 1 Richard I. and the following reigns. To this ſort of argument the other ſide anſwered, that common law did not mean ſuch antient uſage as the counſel for the king now called for, but only common reaſon; and it was reaſonable enough, that one man ſhould confide in another. In proof that the common law admitted ſuch a confidence, they recurred to the ſtatutes of pernors of profits, from the reign of Edward III. downward: in ſhort,

they

CHAP. XXX.

HENRY VIII.

they declared it not a point to be disputed. In support of the second position, they said, that a use should follow the nature of the land; and as it was partible, if of gavelkind, and descended to the youngest son, if of borough English, the same as the land, it was reasonable it should not be devisable any more than other inheritances, unless by special custom. To this it was answered, that a use might pass by bargain and sale by parol; and it would be strange, if after that it should not be devisable by will: and that, at any rate, such a devise was good by stat. 1 Rich. III.; and they quoted a determination in 20th year of the king, where, after some struggle, it was so determined. The third point, which regarded covin, they seemed to found upon the stat. Marlb. made against covinous feoffments of an ancestor to prevent the wardship of the heir; concluding, that every will which had the same effect, should, by the equity of that act, be pronounced covinous. The answer to this was, that the present will carried no covin in it, being merely to settle the estate, and that it was within the saving of stat. 4 Hen. VII [y].

Such were the principal grounds upon which this case was argued on both sides: what the decision was, does not appear. The aspersions which were thrown upon uses by the crown lawyers on this occasion, and the bold manner in which they controverted such established positions of the common law, as the lawful existence of uses, and their being testamentary, shewed that the crown was ripe for giving the final blow to this species of property, which was at length intended by the statute of uses passed this same year.

The statute of uses caused a great revolution in this title of the law. A use, from being an equitable estate, became now a legal one; and the right to the fruits and

[y] 27 Hen. VIII. 7. b.

profits

profits being converted into the actual ſeiſin of the land, no longer ſtood in need of the court of chancery to give it effect, but was cognizable in the courts of common law. The authority of the court of chancery over landed property was by theſe means much abridged and diminiſhed. This for a time had a ſenſible effect; but, when limitations of a new impreſſion were brought before courts of law, certain technical ſcruples aroſe, which the judges did not think themſelves at liberty to get over, and things in ſome meaſure began to fall back into their old channel. An opinion was delivered in the 36th year of this king, that though a feoffment "to a man for life, and after his "deceaſe that *I. N.* ſhall take the profits," be a clear uſe, and executed by the ſtatute; yet if it had been, that "after his death the feoffees ſhould receive the profits, "and pay them over to *I. N.*" as *I. N.* would receive nothing but through the hands of the feoffees, this would not be executed by the ſtatute. After this it was ſeen, that notwithſtanding the ſtat. 27 Hen. VIII. there muſt be recourſe to the aid of a court of equity for the execution of certain uſes, that were particularly circumſtanced.

Operation of the ſtatute of uſes.

THE queſtion on the ſtatute of uſes which created moſt doubt was the condition of the feoffees: what intereſt, what power remained in them, when, at the inſtant of their appointment, the ſtatute transferred the poſſeſſion out of them to the *ceſtui que uſe*. Many of the opinions which had prevailed reſpecting feoffees after the ſtatute of Richard III. were argued upon after the ſtat. 27 Hen. VIII.; they were ſtill conſidered as ſeiſed in fee of the land, notwithſtanding the operation of the ſtatute, as appears from many of the caſes that have been before mentioned: ſo that, upon the whole, a ſubſiſting intereſt ſeemed to be attributed to them, as a kind of guardians and truſtees to the *ceſtui que uſe*; which intereſt, if at any

[a] 36 Hen. VIII. Bro. Feoff. al Uſe, 52,

time

CHAP. XXX.

HENRY VIII.

time partially displaced, could be again brought into being by such an act of ownership as that of entry, or at least by action. According to this notion, the state of the feoffees after the statute of Henry VIII. continued the same as it was after the statute of Richard III. when the concurrent rights of the feoffees and of the *cestui que use* occasioned so much strife. This is another strong instance in which this statute was disappointed of its effect; and this circumstance contributed to lay a foundation for much of the curious reasoning that afterwards arose upon conveyances to uses.

If the intention of the parliament was frustrated in these instances, so was it by the manner of conveying estates which soon followed. It was evidently a principal object of the makers of that act, that land should thenceforward be transferred, as anciently, by feoffment, with livery of seisin, and by other common-law assurances; whereby the notoriety of the alienation might add stability and quiet to every man's possession and right: but it is remarkable, that this very statute, on the contrary, contributed, in the end, to bring feoffments into entire disuse, and gave rise to a secret mode of conveying land pregnant with all the inconveniencies and mischiefs before complained of. They reasoned in this manner: if he who is seised of the use becomes by force of the statute seised of the land, then to give the use, is, in effect, to give the land; and the facility and privacy with which this may be transacted, renders it a desirable way of effecting that purpose. Upon this principle, the conveyances before in practice were continued, legitimated as they now were by the operation of the statute upon them; and others were soon invented of the like nature. A conveyance to uses became, on many accounts, the commonest, and perhaps the surest mode of transferring land. These conveyances have continued in practice ever since; and to give effect to them, is now one of the principal operations of the statute.

THE

THE parliament ſoon ſaw that this would be the conſequence of the ſtatute, in one inſtance; for, if the ſtatute executed every uſe that was raiſed, a perſon who wanted to part with his land had nothing to do but to raiſe a uſe by *bargain and ſale*, as was then commonly practiſed, and the ſtatute would confirm the *ceſtui que uſe* in the ſeiſin of the land as fully as if there had been a tranſmutation of poſſeſſion by feoffment, fine, or recovery. To prevent the miſchief of this in ſome degree, it was enacted by ſtat. 27 Hen. VIII. c. 16. that no bargain and ſale ſhould enure to paſs a freehold, unleſs the ſame be made by *indenture*, and be inrolled within ſix months in one of the courts at Weſtminſter, or with the *cuſtos rotulorum* of the county; after which proviſion, it was thought the conveyance of a uſe would be as notorious as the ancient common-law aſſurances. As to deeds to declare uſes, as they were only appendages to others which made a real transfer of the poſſeſſion, the allowing of them to continue as they were, it was imagined, would not have any very bad tendency.

COVENANTS to raiſe uſes were ſtill in practice, notwithſtanding they had been reprobated by judicial opinions of the courts of law in the laſt reign *. Uſes were originally a matter of invention; and they had not been ſo long canvaſſed in our courts as to preclude every private perſon from perſiſting in ſuch opinions as his fancy or judgment might have dictated, even in oppoſition to one or two declarations from the judges. With theſe ſentiments, many ſtill adviſed them as ſure conveyances; and as ſuch they were practiſed all 'thro' this reign, till they at length obtained a degree of legal recognition.

THE general queſtion as to the validity of a *covenant* to change property, was agitated in the great caſe of the *prior of St. John's*, in 27 Hen. VIII.; and it was there agreed, that if a man covenanted, that on the payment of ſo much money another ſhould have his leaſe of the manor of Dale, the other, upon payment, might enter immediately; for

* Vid. ant. 161.

CHAP. XXX.

HENRY VIII.

this bargain altered the poſſeſſion the ſame, ſays the book, as if it had been a bargain for money[a]. This was a deciſion which, it was thought, afforded a ground of law upon which the force of a covenant to change a uſe might be argued with great degree of probability.

IT was probably on ſuch foundation as this that the determination in 32 Hen. VIII. proceeded. It was there laid down, that where covenants and agreements, and not uſes, were contained in indentures; as if it was covenanted, that *A.* ſhould recover againſt *B.* his land in *D.* to the uſe of the recoveror and his heirs, *and to the uſes of the covenants and agreements in the indenture*; there, if he recovered, the recovery would be to the uſe of the recoveror and his heirs only, and *not* to the uſes of the covenants and agreements in the indentures. But, ſay they, if uſes were ſpecified in the indenture, and it was covenanted that *A.* ſhould recover to the uſe of *A.* and his heirs, *and to the uſes in the indenture*, there the recovery would go to ſuch uſe, and be executed by the ſtatute[b]. Here is a plain declaration that a uſe might be conveyed by covenant. Conformably with this general reſolution, we find two years afterwards an opinion of all the judges, after great deliberation, in favour of covenants to convey uſes. It was determined in *Mantell's* caſe (who had been attainted with the *Lord Dacres*), that where he after the ſtatute of uſes had made a covenant for 100l. and in conſideration of marriage, that he and his heirs, and all perſons ſeiſed of his lands and tenements in Dale, ſhould be ſeiſed of them to the uſe of his wife for term of her life, and then to the heirs of his body begotten upon her, that this would change the uſe; and upon this deciſion the land was ſaved from forfeiture[c].

THUS was a covenant *executed* become a conveyance of the uſe; and, by the operation of the ſtatute upon it, it had

[a] 27 Hen. VIII. 16. b.
[b] 32 Hen. VIII. New Caſes, 133.
[c] 34 Hen. VIII. Bro. Feoff. al Uſe, 16.

the

the effect of a conveyance of the freehold. In this manner was one of the difficulties in the reign of Hen. VII. as to this inſtrument removed; but the other ſtill remained: for as to covenants *executory*, that is, where it was covenanted, that after the covenantor's death his ſon, or ſome other perſon, ſhould have the uſe, there is no deciſion in this reign which goes farther than to ſhew, that the fee-ſimple was not in ſuch caſe taken out of the covenantor; and of courſe, that he was only liable to an action of covenant, if he exerciſed the full power of a tenant in fee, and diſappointed the future uſe [d].

When it was agreed that covenants ſhould be permitted to raiſe uſes, it was expedient to preſcribe ſome rules for their government. The firſt object in this, as in all queſtions about conveying a uſe, was the conſideration. And it was laid down by *Hales*, in 36 Hen. VIII. that a uſe ſhall not be changed by covenant on a conſideration paſſed; as if one covenanted to be ſeiſed to the uſe of *T. S.* becauſe *T. S.* is his couſin; or becauſe *W. S.* before had given him 20l. unleſs it was given for the ſame land. But a conſideration, preſent or future, was held to be a good conſideration; as a conſideration of 100l. paid at the time of the covenant, or to be paid at a future day, or to marry one's daughter, or the like [e]. Covenants, and the conſideration on which they might be raiſed, were a new branch of the learning of uſes, and were much agitated in the following reigns.

Before the queſtion of a covenant was ſettled in this way, and while men were indulging themſelves in every contrivance to maintain theſe ſecret methods of conveying their eſtates, the conveyance by *leaſe and releaſe* was deviſed by *ſerjeant Moore*. This is ſaid to have been framed by that ingenious lawyer for the ſatisfaction of the *Lord Norris*, who wanted to conceal from his family

A leaſe and releaſe.

[d] 34 and 35 Hen. VIII. Dyer, 55. 3. [e] 36 Hen. VIII. New Caſes, 135.

CHAP. XXX.

HENRY VIII.

the ſettlement of his eſtate; a matter that could have created no difficulty but in the interval between the ſtatute which enjoined the inrollment of a bargain and ſale, and this determination in favour of covenants to ſtand ſeiſed. This method of conveying was probably copied from the common-law aſſurance by a leaſe, and afterwards a releaſe, as practiſed in the time of Henry VI. and Edward IV [f]. The way of ordering a leaſe and releaſe was this: Firſt, a bargain and ſale was made of a term for years, which the ſtatute juſt mentioned not conſidering, we may ſuppoſe, of ſufficient importance, does not require ſhould be inrolled: the bargainee being thus poſſeſſed of the term, by force of the ſtatute, was in a capacity to receive a *releaſe* of the inheritance. The deed of releaſe contained the whole ſettlement of the eſtate ſo conveyed, to the various uſes and purpoſes intended to be provided for.

AFTER attempts to limit eſtates in perpetuity had been ſo often made, and ſo repeatedly diſcountenanced and defeated by our courts, theſe new conveyances to uſes were laid hold on as a mode for making a freſh experiment on this ſubject. Being a modern invention, and confeſſedly in defiance of the antient courſe of the common law, it was perhaps thought that ſuch eſtates as might not after former precedents be limited in poſſeſſion, might yet be declared in uſe. The nature of an uſe ſeemed to favour this inclination to convey and ſhift property by the limitations of a deed: it was a creation of the feoffor's, was wholly at his diſpoſal, and was cogniſable in a court where the dictates of general reaſon and equity were ſuppoſed to ſuperſede the rigid precedents of a partial and antiquated ſyſtem. It was probably owing to ideas like theſe, that many of the limitations of eſtates, which began to appear about this time, were made. In the thirty-eighth of

[f] Vid. ant. vol. III. 357.

Hen.

Hen. VIII. there is mention of a conveyance of this kind, which was contrived for the purpoſe of preventing all the perſons taking under it from breaking in upon the limitation thereby made. The grantor infeoffed two perſons to the uſe of himſelf for life, without impeachment of waſte; and after his death, to the uſe of his ſon and his heirs, until the ſon ſhould aſſent and conclude to alien the eſtate, or any part thereof, or to charge or incumber it; and after, and immediately upon ſuch aſſent and concluſion, to the uſe of *A.* and his heirs, with the ſame proviſo, and ſo on to others[g]. It appears that ſuch deviſes were now very common; but none of them coming into court, we know not the ſentiments of the judges upon them, and muſt wait till a ſubſequent period, when they underwent ſome diſcuſſion. Theſe are "the upſtart and wild proviſos and limitations" which are ſo reprobated by a great lawyer[h], in whoſe time they began to grow into great diſcredit, after the encouragement they had received by ſome adjudications in their favour[i].

The introduction of uſes tended much to embrangle queſtions of real property, and the whole law of eſtates; theſe difficulties increaſed after the ſtat. of Rich. III. had given to *ceſtui que uſe* the ſame power over the land which the feoffees had before, and ſtill continued to retain. When the ſtat. 27 Hen. VIII. conveyed the poſſeſſion to the uſe, new perplexities aroſe of a ſimilar kind. Before we take leave of this ſubject, it will be proper to give the reader ſome inſtances of theſe complicated queſtions, which we ſhall now do, without entering minutely into the arguments in which they were canvaſſed.

It has been before remarked, that the caſualty of wardſhip was intimately connected with uſes; and this fruit of tenure was the topic which moſt intereſted the king in the ſuppreſſion of this new ſpecies of conveyance. In our

[g] 38 Hen. VIII. New Caſes, 31. [h] Pref. 4 Rep. [i] Particularly by *Scholaſtica's caſe.*

law-

CHAP. XXX.

HENRY VIII.

law-books, in various caſes, this connection between uſes and wardſhip appears; and ſome of the moſt complicated queſtions relating to the latter aroſe from eſtates in uſe. A remarkable caſe of this kind was argued in the court of common-pleas, on a writ of ward brought by the abbot of Bury againſt *Elizabeth Bockenham*. Certain perſons being ſeiſed to the uſe of *Bockenham* in fee, infeoffed other feoffees to the uſe of Bockenham and Elizabeth his wife, for her life, with remainder to Bockenham in fee. Bockenham died, leaving a ſon under age. The lands being held of the abbot, he brought his writ; and it was a queſtion, whether the infant ſhould be in ward to the plaintiff. After frequent argument, the judges differed: *Shelley* and *Fitzherbert* holding that he ſhould not be in ward to the abbot; and *Baldwin*, that he ſhould. No judgment was given; but it is ſaid that the abbot had the ward by conſent; agreeably with the opinion which afterwards prevailed, namely, that the heir was not in of the new uſe, but of the old one; ſo that being in the old reverſion as heir to his father, and not in of the new remainder by purchaſe, he ſhould be in ward[k].

Two ſettlements made by the lord Burgh, (which have been already mentioned for another purpoſe) gave occaſion to a queſtion upon the wardſhip of his grandſon. In an indenture of covenant on his marriage, before the ſtat. 27 Hen. VIII. he declares the uſes of a recovery to his ſon and his wife, and the heirs of the body of his ſon; after the ſtatute, the ſon had iſſue and died, leaving the iſſue within age: the land was holden of the king, and it was a queſtion, whether the infant ſhould be in ward to the crown, or out of ward, during the life of the mother. This matter was heard in the new *Court of Wards and Liveries*; and it was held by the king's ſerjeant and attorney, by the attorney of wards, by *Brooke* and others,

[k] 28 Hen. VIII. Dyer, 7. 11.

that

that the iſſue ſhould be out of ward during the life of the lord Burgh, who was ſtill the king's tenant; for having expreſſed no uſe of the fee, the ancient uſe of the fee-ſimple remained in him; and ſo when the ſtatute paſſed, the poſſeſſion veſted in the ſon and his wife, as the uſe before did, and the fee-ſimple in the father, who was donor of the uſe. At the time of the ſame marriage, the lord Burgh ſettled other lands by covenant in this way: namely, "that his eldeſt ſon, immediately after his death, ſhould "have in poſſeſſion, or in uſe, all his lands," &c. In this, as in the former, the queſtion of wardſhip turned upon the fee-ſimple, whether it was out of the covenantor; and they held that it was not [1].

The breaking into old ſettlements, and then reſettling the family eſtate, as in one of the preceding inſtances, in a new way, furniſhed frequent queſtions of remitter. Theſe were always difficult points, and were rendered ſtill more complex by their connexion with uſes. This will be evident from the following inſtances. Tenant in tail made a feoffment before the ſtat. 27 Hen. VIII. to the uſe of his wife for life, remainder to his ſon and heir in fee; after this the ſtatute paſſed, then the feoffor died, and then the wife and the ſon entered; it was doubted, whether he ſhould be remitted to the entail. *Dyer* ſeems to think he ſhould not, becauſe the ſtatute executed the poſſeſſion in him in the ſame manner in which he had the uſe, and that was in fee; but he thought the iſſue would be remitted. Again, a woman tenant in tail took huſband, who made a feoffment before the ſtat. 27 Hen. VIII. to the uſe of himſelf and his heirs, and after having iſſue by his wife, he died: the wife died, the iſſue entered, and made a feoffment to the uſe of himſelf and his wife and his heirs, and then died, leaving an heir within age; then the ſtatute 27 Hen. VIII. was paſſed; afterwards the wife died, and a

[1] 34 and 35 Hen. VIII. Dyer, 54. 1.

queſtion

CHAP. XXX.

HENRY VIII.

queſtion aroſe, whether he was remitted to the entail. No deciſion was made in either of theſe caſes; but in the following, which was of a feoffment in fee by a tenant in tail, who died his heir within age, after which the ſtatute paſſed; it was adjudged, in conformity with the opinion of *Dyer* before-mentioned, that the heir was not remitted [m]. The expectation in all theſe caſes was, that becauſe an eſtate was thrown upon the *ceſtui que uſe* by the ſtatute, it was within the common-law notion of a remitter, that he ſhould poſſeſs not in the form in which it was caſt upon him by the law, but in his better or more antient right, by remitter. But this reaſoning was done away by another which was equally technical and refined; for it was anſwered by *Baldwin*, the chief-juſtice, that the eſtate was not caſt upon the *ceſtui que uſe* by the law, but by *his own act*; namely, by an act of parliament, to which every man is a party [n]. The better reaſon however was, that the ſtatute gave the poſſeſſion and ſeiſin in no other way than the party had the uſe, and no ſeiſin could be conveyed to an uſe which he had not.

Of wills.

THE ſtatute of wills may be conſidered as having introduced a new ſpecies of conveyance. A deviſe became now a common aſſurance, which effected a complete transfer of the freehold. We have ſeen that many points had already been determined on wills of land deviſable by cuſtom, from which the formal and effective parts of a will were tolerably well ſettled; but a new turn was now given to theſe inſtruments. Theſe practice of deviſing *uſes*, where it was not the cuſtom to deviſe the *land*, had lately made wills much more frequent than they had been. Theſe, which were nothing more in effect than declarations of uſes, became precedents for wills after the ſtatutes of wills: ſo that in addition to the looſe wording which was allowed in wills of land at common law, and the liberal conſtruc-

[m] 34 Hen. VIII. Dyer, 54. 21, 22. [n] 28 Hen. VIII. Dyer, 23. 148.

tion

tion which they received, in order by all poſſible ways to give effect to the intention of the deceaſed, however untechnically expreſſed; in addition to theſe properties and circumſtances relating to wills of land, they were now to be conſidered, likewiſe, in the light of declarations of uſes, and as ſuch were to be interpreted with great indulgence and equity. Theſe conſiderations rendered the ſubject of wills of land ſomewhat curious and complicated; eſpecially when entangled in the diſtinctions and refinements with which entails and limitations abounded. The difficulty in all theſe caſes was, how to effectuate the intention of a teſtator, without intrenching on ſome rule of law.

In reviewing what was done by the courts in forming and modelling the law of deviſes, our attention is firſt caught by thoſe determinations which illuſtrate the remark we have juſt been making on the equity with which theſe inſtruments were conſtrued, and the contraſt which they, on that account, exhibited, when compared with grants. This conſtitutes the moſt intereſting topic in the law of deviſes, and will demand our attention in a particular manner, as deviſes were now authorized by parliament, and the occaſions for diſcuſſing them were more frequent.

Conſtruction of wills.

The firſt information upon this head preſents itſelf in the nineteenth of the king; when *Engleſield* ſtates it as an acknowledged point of law, upon which he might argue, that a deviſe to a man in fee, and if he dies without heirs, then to another, was void in law; for a fee-ſimple could not by law depend upon another [o]. This is an inſtance in which no indulgence was allowed to a gift by will, beyond that of deed. This queſtion was conſidered ſome few years afterwards, when a reaſon was given why the law would not ſuffer ſuch a deviſe. A man had given his land to a religious houſe, by the cuſtom of Lon-

[o] 19 Hen. VIII. 3.

don,

CHAP. XXX.

HENRY VIII.

don, which allowed lands purchaſed to be given in mortmain; with this condition, *ita quòd reddant* ſo much money yearly to the dean and chapter of St. Paul's; and if they failed, that their eſtate ſhould ceaſe, and the dean and chapter and their ſucceſſors ſhould enter. Upon an entry being made, it was held clearly by *Baldwin* and *Fitzherbert*, that the condition was void; for, ſaid they, it could not remain after a gift of the fee-ſimple; the feoffor having determined his intereſt and right: beſides, a ſtranger could not enter for the condition broken, but only the heir [p]. It may be remembered, that the very reaſon given by Littleton why the limitations in *juſtice Richel's* will were void, was, becauſe the heir, and not a ſtranger, was the proper perſon to enter for a condition broken [q]. The diſtinction had not yet taken place between conditions and conditional limitations.

THE ſame ſcruples which the courts had in allowing a fee to be given after a fee by will, were entertained reſpecting the deviſe of a chattel intereſt: they were as jealous of theſe perpetuities as of the former, though they begun to relax in this reign as to the latter. A man poſſeſſed of a term for forty years made his will, and deviſed it to his eldeſt daughter, and the heirs of her body; and if ſhe died without any, then to his ſecond daughter in tail. The eldeſt daughter married, and dying without iſſue within the term, the huſband ſold it; and it was doubted, whether the ſecond daughter had any remedy. It was there ſaid by *Baldwin* and *Shelley*, that ſhe had no remedy, the deviſe being againſt law; for a term could not be given in remainder any more than a chattel perſonal, as had been determined, they ſaid, in the reign of Henry VI. *Engleſield* thought the remainder was good, conſidering it was by will; and the intention of the teſtator was to be effected as well as it could. This was no more than in

[p] 28, 29 Hen. 8. Dyer, 33. 12. [q] Vid. ant. vol. III. 324.

other

other words, that if the eldeſt daughter died without iſſue within the term, the ſecond ſhould have it. To this it was obſerved by *Baldwin*, that the caſes were different; for he approved of a deviſe of a term upon condition, and that if the deviſee died during the term, a ſtranger ſhould have it; for then the whole term and intereſt would not be given, but only ſo much as elapſed during his life. But here the teſtator made an abſolute unqualified gift to the eldeſt daughter. And he ſaid that he had been concerned, when a ſerjeant, in a caſe ſimilar to the preſent, and that was determined to be ill [r].

THE former was a deviſe of a term *in tail*: it was afterwards laid down for law, that where a term for years, or other chattel was deviſed *for life*, with remainder over; there, if the deviſee did not alien it, the perſon in remainder ſhould have it. But if he had diſpoſed of it, the remainder-man had been without remedy [s]. This was ſanctioning an abſolute gift of a chattel for life, with remainder over. In a ſubſequent caſe it was laid down ſo largely as apparently to warrant a remainder after an inheritance in tail, if the occupation and not the thing itſelf was given. For it is ſaid to have been agreed for law, that the *occupation* of a chattel might be deviſed by way of remainder; but if the thing itſelf were deviſed to be uſed, the remainder would be void: for a gift or deviſe of a chattel, if but for an hour, was the ſame as for ever; and the donee or deviſee might diſpoſe of it as he pleaſed [t]: an opinion that was not wholly novel *. Thus was the rigour of the old law gradually ſoftening, till theſe teſtamentary diſpoſitions were at length recogniſed by the courts, under the name of *executory deviſes*, which ought, in reaſon, to be ſupported and rendered effectual.

WHENEVER the judges could diſpenſe with the rigour of the old forms of conveying property, they were ready

[r] 28 Hen. VIII. Dyer, 7, 8.
[s] 33 Hen. VIII. New Caſes, 49.
[t] New Caſes, 83.
* Vid. ant. vol. III. 369.

to

CHAP. XXX.

HENRY VIII.

to give all assistance towards establishing a devise. The following is a strong instance of this favourable construction. A man had devised, that *T. S.* should have his land after the death of his wife: they held that, upon this devise, the wife should have the land for her life, because they thought it evident, from the manner of the gift, that the testator meant it so[u]. In the following case, a rule of law was made to give way to the great object of fulfilling the intention of a testator. Land had been devised to two, *et hæredibus eorum;* it was held by *Lord Audley*, then chancellor, that the surviving devisee should not take the entire estate by survivor, but only a moiety[w]. Again, a devise to a man and his heirs male, was construed by *Fitzherbert* and *Shelley* to be clearly an estate tail, without the word *body*; because it appeared the intention of the testator that it should be so[x]. Where a man willed that his feoffees should make an estate to *I. N.* and the heirs of his body, this was supported as a complete devise, because of the testator's intention[y]. If a devise was made to *I. N.* without adding any thing more, it would, like a gift or grant, be only for life; but this might be explained by circumstances to mean a larger estate; as where it was said, "paying 100l. to *A. B.*" this was held to give a fee-simple; and if the devisee did not pay it himself, his heir or executor might[z].

No point in the law of devises had created more discussion than the power delegated to executors to sell land. A statute was made in this reign to remove one difficulty, but many still remained. The following is an instance where a question of this kind was argued with much difference of opinion. A man devised land to his son in tail; and if he died without issue, he willed that *A.* and *B.* his executors should sell it. *A.* died, *B.* survived, and made *M.* his exe-

[u] 29 Hen. VIII. New Cases, 80.
[w] 30 Hen. VIII. Ibid. 81.
[x] 27 Hen. VIII. 27.
[y] 38 Hen. VIII. New Cases, 82.
[z] 29 Hen. VIII. New Cases, 277.

cutor,

cutor, and died: then the ſon died without iſſue, and *M.* ſold the land; the queſtion was, whether this ſale was good. This caſe was argued in the exchequer-chamber before all the judges; when it was agreed by all, except *Norwiche*, *Fitzherbert*, and *Moore*, that the ſale was not good. The three diſſenting juſtices urged the old rule of law, that the will of the teſtator ſhould be ſupported by all intendments, though not expreſſed in clear words. Thus a deviſe *in perpetuum* was conſtrued a fee-ſimple. A deviſe "to give and to ſell as he pleaſes," had been conſtrued a fee-ſimple, becauſe the meaning of the teſtator in theſe two caſes appeared to be ſuch. So here the teſtator muſt have been aware, that the eſtate tail might laſt beyond the life of his two executors; and therefore he meant that the land ſhould be ſold by their repreſentatives, that being the only way in which the executors could ſell. Thus, they ſaid, if a man willed that his feoffees ſhould ſell; yet if it happened that the land had been paſſed by recovery or fine, and not by feoffment, then the recoverors or conuſees would have the power, becauſe it was the teſtator's intent that thoſe who had the land ſhould ſell it; and that was of more importance than the particular name under which they held it. If a will was, that after the expiration of an eſtate tail, the chief-juſtice of England ſhould ſell the land, it muſt mean the chief juſtice for the time being, and not at the time of making the will.

On the other ſide it was ſaid, that this was not a teſtamentary donation, but a *power* to a particular perſon to do a certain act; and as that related to the diſpoſal of land, and ſo required more circumſtance than the diſpoſal of perſonal things, they thought it ſhould be conſtrued more ſtrictly on that account; for a perſon might give a verbal direction to diſpoſe of any chattel to another; but if he would give authority to make livery of ſeiſin, it muſt be in writing. The law ſo much favoured the inheritance in preference to the diſpoſition by will, that if there was any thing

CHAP. XXX.

HENRY VIII.

thing uncertain and doubtful, the land would go to the heir. Thus if a will was, that *H.* ſhould ſell land, and he died before he had ſold it, it ſhould not be ſold at all; for the heir of *H.* could not ſell under the words of the will, it being a truſt in *H.* which if he did not perform according to the will, the land would go to the heir of the teſtator. Again, if a teſtator directed that *B.* and *C.* ſhould ſell his land, *B.* could not alone ſell it, becauſe the truſt was joint. The ſame of a letter of attorney to two to make livery, one could not make it; and if to one, he could not transfer the truſt to another. If I deſire a perſon to ſeal an obligation for me, he could not authoriſe another to do it. So in the preſent caſe, the two executors could not, much leſs could the one who ſurvived, give the truſt to another, namely, to their executors.

As to the intent of the teſtator, they ſaid, that could be carried no further than his words would ſupport it; for every one muſt allow, that where a will authorized ſuch a prior or ſuch a mayor to ſell his land, and there was no ſuch mayor or prior, that the land could not be ſold, notwithſtanding it was the teſtator's intent that it ſhould. In many caſes a will failed of its intention, either on account of the uncertainty who was to execute it, or of the perſon who was to execute it failing; as if a teſtator had willed that his executors ſhould ſell his land, and afterwards forgot to name any, or willed that it ſhould be ſold, but did not ſay by whom; in all theſe caſes the will would be ſo far void. But if land was to be ſold by the heir of *B.* this was ſuch a general term as would include every heir to the twentieth degree, as well *ex parte matris*, as *ex parte patris*; but if *B.* died without heirs, or was attainted, the land could not be ſold.

The teſtator, in the preſent caſe, being *ceſtui que uſe*, the juſtices took occaſion to conſider the deviſe in that light; and it was agreed by all of them, that before the ſtat. 1 Rich. III. a will of land made by him who had the uſe was not

not good, unleſs the feoffee would concur in ſubſtantiating it; and now, they ſaid, it was only by equity of that ſtatute that a will by *ceſtui que uſe* was good. They ſaid, that when this power was given to his executors, the term *executors* was a *deſcriptio perſonæ*, and did not mean all perſons who by law might become executors; as by ſtat. 25 Ed. III. c. 5. executors of executors; and they ſaid, in this caſe, if *A.* and *B.* had declined adminiſtering the effects, they, though not really executors, might ſtill ſell under the power [a].

SUCH were the arguments on both ſides of this queſtion. It was probably owing to this ample diſcuſſion that the parliament, about two years after, came to a reſolution to remedy the conſequences which followed from ſome of the opinions here delivered for law. It was declared by ſtat. 21 Hen. VIII. that when one or more of the executors refuſed to take upon them the adminiſtration, the others who had might ſell. This, however, left untouched almoſt every thing delivered above; which, after the agreement of ſo many judges, muſt be conſidered as the law of the time. It ſeems too as if this ſtatute had been conſtrued by equity ſo as to authorize certain acts which were not legal on the principles of the above reſolutions of the judges. In the thirtieth of the king, where land was to be ſold by the executors after the death of *J. S.* and the teſtator made four executors and died, and then two of the executors died, and then *J. S.* died; it was held by ſome, that the two ſurviving executors might ſell, becauſe the time for ſelling was but juſt then arrived [b]; and that was alſo the opinion of *Brooke* [c].

THE next object is the juriſdiction of courts. The alterations and innovations that were made in our judicial polity by parliament have already been related. Henry made others by his own authority. The natural courſe of events will always contribute to give a new turn to the

[a] 19 Hen. VIII. 9.
[b] 30 Hen. VIII. New Caſes, 82.
[c] 30 Hen. VIII. New Caſes, 81.

practice

CHAP. XXX.

HENRY VIII.

practice and proceedings of courts. We have ſeen how the king's bench had acquired an acceſſion of civil buſineſs; and in what manner that was increaſed by the diſuſe of real actions, and the increaſe of actions upon the caſe. But with reſpect to theſe, they made ſome diſtinction. Some of theſe were conſidered as not proper ſubjects of cogniſance here. It was held in this reign, that an action upon the caſe againſt an hoſtler, for a horſe ſtolen out of a common inn, would not lie in the king's bench; the ſame opinion prevailed where a perſon negligently kept his fire [a]; and in ſome other inſtances.

The court of chancery.

It is ſtated by a writer of this reign, that the court of chancery would give relief in covenants made without writings, if there were ſufficient witneſſes to prove them; and diſcovery of evidences might be obtained there, when the plaintiff knew not the certainty of them, or what they contained. A ſingular piece of equity was adminiſtered in the following inſtance, which is mentioned as a common courſe of relief in that court. A man bound in an obligation was ſued in a county where the deed was not executed: the obligor brought his bill, ſurmiſing, that by ſuch foreign ſuit he was ouſted of divers pleas which he might have had, if the action had been brought in the proper county: this was conceived a proper ſubject for relief in equity; which was, we may ſuppoſe, by injunction [b].

The juriſdiction of this court was greatly enlarged during the time that cardinal Wolſey preſided there. He choſe to exerciſe his equitable authority over every thing which could be a matter of judicial enquiry. At length, finding himſelf loaded with the number of petitions, often full of untrue ſurmiſes and frivolous complaints, he grew weary of attending to all theſe himſelf; and therefore, as well for his eaſe at all times, as to provide perſons to ſupply his place when abſent on political avocations, he cauſed

[a] Div. of Courts. [b] Ibid.

four

four courts to be erected by commiſſion from the king. One of theſe was held at Whitehall; another before the king's almoner, Dr. Stokeſby, afterwards biſhop of London; a third at the treaſury-chamber; the fourth at the rolls, before Cuthbert Tunſtall, who was then maſter of the rolls, and uſed, in conſequence of this appointment, to hear cauſes there in the afternoon [c].

THIS was the firſt inſtance of the maſter of the rolls hearing cauſes, he having before been only the principal of that council of maſters aſſigned for the chancellor's aſſiſtance; nor is there any notice of a perſon being authoriſed to hear cauſes in the chancellor's abſence till now, when not only the maſter of the rolls had this delegated juriſdiction, but alſo the ſeveral courts juſt mentioned.

THE cardinal maintained his equitable juriſdiction with a high hand; entertaining in one department or other complaints of almoſt every kind, and deciding with very little regard to the common law. This conduct in his judicial capacity furniſhed grounds of accuſation againſt him, when articles were exhibited containing an enumeration of all this great miniſter's offences. He was charged with having examined many matters in chancery after judgment given at common law, and obliging the parties to reſtore what was taken under execution of ſuch judgments [d]. He was accuſed of granting injunctions without any bill filed [e]; and when thoſe would not do, of ſending for the judges and reprimanding them [f]. There is no mention of theſe courts which he had procured to be eſtabliſhed; and which, probably, at that time were thought perfectly legal under the king's commiſſion. After all, notwithſtanding theſe complaints of the cardinal's adminiſtration of juſtice, he has the reputation of having acted with great ability in his office of chancellor; which lay heavier upon him than it had upon

[c] Hiſt. Chanc. 55.
[d] Articles againſt Wolſey, 20.
[e] Articles againſt Wolſey, 21.
[f] Ibid. 26. 4. Inſt. 92.

CHAP. XXX.

HENRY VIII.

any of his predeceſſors, owing to the too great eaſe with which he entertained ſuits, and the extraordinary influx of buſineſs which might be attributed to other cauſes.

THIS ceaſed with the removal of the chancellor; and the buſineſs there ſoon ſunk to its natural level, perhaps rather below it. It is ſaid, that ſir Thomas More, in 22 Hen. VIII. read all the bills himſelf; that on ſome of the days in term there was no cauſe nor motion; and that at one time he had actually diſmiſſed every cauſe in his court. The ſtatutes of wills and of uſes, in a courſe of time, ſupplied new materials and furniſhed full employment for the chancellor, who again began to ſtand in need of aſſiſtance; which led to confirming the maſter of the rolls in his new judicial authority.

The chancery.

AS the chancellor was to adminiſter juſtice according to the dictates of his conſcience, ſome perſons were curious to enquire to what duties in the diſcharge of his office the ſame obligation of conſcience ought to bind him. In this point they ſeem to have rigidly exacted a ſcrupulous exerciſe of his duty from this judge of equity. It is declared by an advocate for this new court, that if the chancellor granted a ſubpœna without taking ſurety, as required by ſtat. 15 Hen. VI. c. 4. and, the matter of the bill being found untrue, the plaintiff was unable to ſatisfy the damages the defendant had ſuſtained, the chancellor was bound in conſcience to yield them. Again, if a bill was brought after judgment paſſed in the king's court, and he took ſureties that were afterwards found inſufficient, and the bill was proved untrue, he would be bound to render the damages, becauſe it was enacted by ſtat. 4 Hen. IV. c. 23. that judgments in the king's courts ſhould not be examined in the chancery, parliament, or elſewhere. So if the chancellor gave judgment upon vehement conjecture, or other information without proof, and better information was offered him, he was held to be bound in conſcience either to amend his ſentence, or make reſtoration to the party

party of all he loſt by it. But if he proceeded upon proofs that turned out to be untrue, no redreſs need be made, becauſe he had reſorted to that trial which was appointed by law: for the better opinion ſeems to have been, that the chancellor was to determine *ſecundum allegata et probata*, and not according to his conjectures and ſurmiſes, as ſome held, under an idea of reaching the real truth of the caſe; and it was accordingly held, that if a perſon had no proof by witneſs, in writing, or otherwiſe, he could have no remedy in chancery. The chancellor, however, might ſo far exerciſe his diſcretion, as, upon a very ſpecial cauſe, and not otherwiſe, to admit a perſon, as well after publiſhing of witneſſes as before, to alledge any new matter that had recently come to his knowledge. For the like purpoſe, a great latitude in pleading was allowed. They held alſo, that he might ſuffer the parties to change their demurrer, which was not allowed in any other of the courts. Again, a double plea, or departure in pleading, or two pleas, where one went to the whole bill, were conſidered as no irregularity in chancery; for the truth was to be inveſtigated by any poſſible means, except ſurmiſe or conjecture.

SOME went ſo far as to make the chancellor liable in conſcience if he granted a ſubpœna on a matter cogniſable at common law; others made a diſtinction where the matter was apparent, and where it was doubtful; others would make him anſwerable for unneceſſary delays in ſuits. But all theſe were refinements that ended in mere ſpeculation; for the chancellor, being a judge of record, was not compellable by law to make amends to any one for errors of judgment, or for any judicial proceeding directed by him[g].

NOTWITHSTANDING the chancery was now long eſtabliſhed in poſſeſſion of its equity-juriſdiction, there were not wanting advocates for the ancient common law, who took upon them to controvert this novel practice by ſubpœna: this led to a diſcuſſion, in which the nature of this

[g] Harg. Tracts, vol. I. 348.

CHAP. XXX.

HENRY VIII.

jurisdiction was canvassed on both sides very strenuously, but with very different force and success.

THOSE who questioned this new judicature contended, that it was unreasonable for the chancellor to dispense with the common law of the realm in favour of a particular person, who by some negligence or folly had disabled himself from obtaining redress in the usual course of proceeding: that what was so done in the chancery was contrary to the common law; and if it was right and lawful, the common law must needs be abrogated, for two contrary laws ought not to prevail at the same time. They marvelled how the chancellor dared to issue writs of subpœna to restrain persons from obtaining redress at the common law, which the king himself could not do by law. The judges were sworn to administer the law indifferently, which the chancellor was not; the serjeants were sworn to see the king's subjects justified by the law, determinable by the king's judges, but not by the chancellor; all which was contravened, if any man could be stopped from his suit by subpœna. Again, if the known law of the realm was to be over-ruled by the discretion of one man, what dependence could the subject have? conscience, the great criterion of decision in this court, being too variable and unascertained to be a rule of judicial determination.

THEY attributed the great licence of chancellors to their being most commonly spiritual men, ignorant of the common law; who, trusting to their own sagacity, thought they could correct with ease what appeared to them to be defective in the ancient law of the realm. And yet whoever looked into the *Natura Brevium* would find, that the common law had provided remedies for most of the injuries that could be sustained, although there was no mention of any writ of subpœna; which, if authorised by the common law, would surely have been inserted there for the instruction of students. Finally, they contended that the whole proceeding by subpœna was in direct violation of

stat.

ſtat. 20 Ed. III. by which neither the chancellor, nor any other, ought to ſend any writ or writing to any juſtices to prevent their proceeding according to the common law of the realm; for, ſaid they, it is the ſame miſchief to ſend ſuch writ to the party, as it was before that ſtatute to ſend it to the juſtices; and ſuch writ could not be juſtified any more in the one caſe than the other. In all theſe attacks upon the court of equity, they never failed to inveigh againſt uſes, as a crafty and illegal innovation [h].

On the other ſide it was alledged, that writs of ſubpœna had iſſued during the times of ſo many chancellors both ſpiritual and temporal, in the reigns of ſo many kings, that it muſt not be preſumed that they acted without good authority of the king and his council, and with the knowledge of the whole realm. That it appears from reports of years and terms, that the chancellors in matters of doubt had called in the advice of the judges, who had given their ſanction to the application of this writ. They alledged the ſtat. 17 Rich. II. giving damages, and ſtat. 15 Hen. VI. requiring ſureties of the plaintiff, which were parliamentary recognitions of the authority aſſumed by the chancellor. And as to ſtat. 2 Ed. III. c. and ſtat. 20 Ed. III. c. they ſaid, the ſubpœna was always directed to the party, and not to the juſtices; and therefore, when the party ſurceaſed to call upon the juſtices for further proceſs, they surceaſed to give it him; but if it was directed to them, they need not pay obedience to the writ.

As to the objection, that giving relief in chancery contrary to the common law was ſetting up two laws in the

[h] Theſe ſentiments are contained in a manuſcript tract of the time of Henry VIII. intitled, "A Repli-"cation of a Serjeant to certain "Points alledged by the Student "in St. Jermyn's Dialogue;" and thoſe which follow are contained in a manuſcript tract aſcribed to St. Jermyn, written in anſwer to the ſuppoſed Serjeant, and in ſupport of what had been alledged in favour of the court of chancery. Theſe two ancient pieces are printed in the firſt volume of Mr. Hargrave's Collection of Law Tracts.

king-

CHAP. XXX.

HENRY VIII.

kingdom, they ſaid, that although a man ſhall not at common law plead payment of an obligation without writing, but in chancery he ſhall, yet the law in both courts, as to the right of the debt, was the ſame. The judges knew as well as the chancellor that a payment diſcharged the debt in reaſon and conſcience; but by the maxims and cuſtoms of the law of long time uſed, they could not admit payment only as a ſufficient plea, though they did not pretend that ſuch maxims and cuſtoms extended to all courts. In like manner, in an action on an obligation under forty ſhillings in the county, hundred, or court-baron, the defendant might wage his law; and in London he might confeſs the deed, and pray that it might be enquired what was due upon it. So the ſuperior courts had reſpectively different cuſtoms. Thus in the common pleas an outlawry might in ſome caſes be reverſed without a writ of error, but never in the king's bench: in the former court, upon the firſt default on a *ſcire facias*, execution was awarded; but in the latter, an *alias* uſed to iſſue. Why, therefore, might not certain rules hold in chancery, that did not hold in the king's bench and common-pleas? Further, the chancery differs from itſelf in practice; for if an officer was to ſue there by privilege on an obligation, payment could not be pleaded, any more than in the king's bench or common-pleas, without writing; but the defendant muſt pray an injunction, and go on by bill and ſubpœna. It ſeemed, therefore, to them to be an advantage to the ſubject that the rule of law ſhould ſtill prevail in the courts of common law; but that the court of equity in chancery ſhould be at liberty to proceed without the reſtraint of it.

As to the chancellor preventing by this writ the progreſs of ſuits, which could not lawfully be done by the king, they ſaid, the king's oath was, that "he ſhall grant "to hold the laws and cuſtoms of the realm;" but if the laws and cuſtoms of the realm are, as well thoſe in chancery as thoſe at common law, as they were juſt ſhewn to

to be, then the chancellor might adminiſter juſtice by ſubpœna. And though the chancellor was not bound by oath to do juſtice, yet he was bound by conſcience, and more deeply than the judges; for he muſt form his judgments according to the law of God or of reaſon, or the law of the realm, grounded upon thoſe laws. If he erred, therefore, there was greater fault in him than the judges; for theſe grounds of deciſion were more evident than the general maxims and ſome cuſtoms of the realm. For the chancellor need not meddle with the general rules of the law, nor with writs, nor forms of pleading, which conſtituted the greateſt difficulties of the law. They thought the reaſon why no writ of error lay upon a judgment given on ſubpœna by the chancellor, might be, becauſe the law preſumed that no man could err contrary to laws ſo plain and evident; and if he did err, he was bound to reform it, or to make reſtitution, more ſo than the judges of the common law; for judges might ſometimes give judgment againſt their own knowledge, but the chancellor was never bound ſo to do; not being bound, as they were, to any ſpecial forms of trial or proceeding.

THEY contended, that no danger was to be apprehended from the diſcretion and conſcience of one man, when put in contraſt with the judgment of the common law; for the chancellor was always a perſon choſen by the king for his ſingular wiſdom and integrity, and he was to be governed by the law of God, of reaſon, and of the realm, not contrary to the two former laws; and by theſe rules he was to order his conſcience. Thus if, before the ſtatute of wills, a man deviſed his land in fee, the chancellor was bound to determine this will to be void in conſcience, becauſe it was void in law. So that it was not a ſcrupulous or capricious determination of the chancellor's mind, but a legal diſcretion dictated by the abovementioned conſiderations that was to govern him in his deciſions. They denied that the common law had provided ſufficient

redreſs

CHAP. XXX.

HENRY VIII.

redreſs for all injuries in the common-law courts, without the aid of conſcience; and they ſaid it was no objection to the writ of ſubpœna, that it was not to be found in the *Natura Brevium*, that work being defective in many other particulars; not containing the action upon the caſe, writ of forcible entry, and many others, which were undeniably warranted by the common law [i].

We may cloſe what is here ſaid of the court of equity by a paſſage in the life of a very eminent chancellor, who has been before named. Sir Thomas More being informed that the judges had expreſſed their diſapprobation of the injunctions he had granted, cauſed a docket to be made of every injunction, and the cauſe of it, which he had granted while he was chancellor; and inviting all the judges to dine with him, in the council-chamber at Weſtminſter, he introduced the ſubject after dinner; when, upon full diſcuſſion of every one of them, the judges confeſſed that he could have acted no otherwiſe. He then offered, that if the judges of every court, to whom it more eſpecially belonged, from their office, to reform the rigour of the law, would, upon reaſonable conſideration, by their diſcretion, and, as he thought, they were in conſcience bound, mitigate and temper the rigour of the law, no more injunctions ſhould be granted by him. To this they would make no engagement; upon which he told them, that as they themſelves forced him of neceſſity to iſſue injunctions to relieve the people's injuries, they could no longer blame him. We are informed, that afterwards, in a confidential converſation, he accounted for the backwardneſs of the judges in the following manner: That they ſaw, how, by the verdict of a jury, they might transfer all difficulties and odium from themſelves to the jurors, which they conſidered as their great defence and ſecurity; whereas the chancellor was obliged to ſtand alone the aſſault of every malignant obſervation [k].

[i] Harg. Tracts. vol. I. 337. 357. [k] Rooper's Life of Sir Tho. More, 58.

THE

Court of requeſts.

THE court of requeſts begun in this reign to be ſtrengthened by a particular commiſſion, and to riſe into greater conſideration than it had before enjoyed. When this new authority was added to it, is not eaſily aſcertained: it is not probable, that it was before the 21ſt year of this king; for this court had not then acquired ſo much notice as to be mentioned by the book *Of the Diverſity of Courts*, written in that year. It is not mentioned in the treatiſe of *St. Jermin*, called "Doctor and Student," nor in any of the Reports of this reign: tho' we find that ſtat. 32 Hen. VIII. c. 9. puniſhes perjury committed there; and Lambard ſays, he had ſeen the Book of Entries belonging to this court, in a regular ſeries from the 8th of Henry VII [l].

THIS court was derived from that general ſource of judicature which we have ſo often mentioned as reſiding in the king, to be exerciſed in ſuch caſes as were not provided for in the ordinary courſe of juſtice. As ſome of the complaints preferred to the king were referred to the council, ſome to the parliament, and ſome to the chancery; ſo others, particularly petitions offered by poor perſons and thoſe of the king's houſhold, were referred to ſome one or two of the council, with a biſhop, ſome doctors of the civil and canon law, and ſome common lawyers, who were called *Magiſtri à libellis Supplicum*, or, *Maſters of Requeſts*. Theſe perſons uſed to hear and determine them according to their beſt judgment and diſcretion. This ſpecies of cogniſance had now grown into a court of ſome conſequence, partaking of the nature of the chancery as to its meaſure of deciſion; but ſtill confined to the ſuits of poor perſons, and thoſe of the houſhold; which qualifications were uſually ſuggeſted in the bills of complaint [m]. In that character it ſubſiſted for many years, till it was aboliſhed, like others of a like equivocal nature, by parliament [n].

[l] Lam. Archeion, 228. [m] Ibid. 228. [n] Namely by ſtat. 16 Car.

THO'

CHAP. XXX.

HENRY VIII.

Preſident and council of the North.

THO' Wolſey's courts fell with him, we find the king erected ſeveral new judicatures in the like way. We have before ſeen, that Henry had eſtabliſhed a tribunal under the ſtile of *The Preſident and Council in Wales*: this was done by letters patent, without any authority from parliament. Henry erected another court by letters patent, called *The Preſident and Council of the North*. After the ſuppreſſion of the leſſer monaſteries, ſome diſturbances and inſurrections had broke out in Lincolnſhire and Lancaſhire, under pretence of vindicating the cauſe of the injured churchmen: upon which Henry, in order to prevent the like commotions upon the diſſolution of the remaining religious houſes, which he then had in contemplation, as well as to preſerve the general order and peace of the northern counties, eſtabliſhed, in the 31ſt year of his reign, this new juriſdiction. This court, as it was formed after the example of the king's own council, had, like that, a general authority, not well defined: it had two commiſſions; one of *oyer and terminer*; another, empowering them to hold plea of real and perſonal actions, where either of the parties were ſo poor as to be unable to purſue the common courſe of legal redreſs; and the judges were to give ſentence either according to the law and cuſtom of the realm, or in an equitable way, according to their wiſdom and diſcretion. This accommodation of a court to decide civil queſtions without the expence and tediouſneſs of the common law, was conceded in compliance with the earneſt requeſt of the rebels themſelves. What other authority the commiſſioners had, uſed to be ſet forth in the commiſſion, which generally gave them powers of ſuperintendance and enquiry as to the police and government of that part of the country. In after-times, the commiſſion uſed to be made in a general way, in order to conceal thoſe extraordinary powers with which they were to be armed; and contained a reference to ſecret inſtructions by which they were to be directed. Theſe concealed

cealed inſtructions, as they carried in them ſomething ſuſpicious, excited much clamour at different times againſt the very being of this court, and at length contributed to its diſſolution [o]. There was a court called "the Preſident and Council" erected in the Weſt, by ſtat. 32 Hen. VIII. c. 50. with the ſame authority as this in the North, and that in Wales.

SUCH were the courts that were now employed in the adminiſtration of juſtice. We ſhall next make a few obſervations on the perſonal actions now in uſe, having enlarged ſufficiently on real remedies in the earlier parts of this Hiſtory. The effect of covenants and agreements was a ſource of endleſs debate in the courts of law; and as perſonal property increaſed in value, all contracts concerning it became more ſerious objects of litigation. The law upon this ſubject was now better underſtood, and more fully explained than in any of the foregoing periods. In pleading to an action founded on covenants, they had lately got into a conciſe way, which was not approved by ſome eminent judges. In 26th of the king, in an action of debt on a bond for performance of covenants in an indenture containing many covenants, the defendant had contented himſelf with rehearſing the condition and the indenture, and then ſaying generally that he had performed all the covenants. This general pleading was reprobated ſtrongly by *Engleſield*, *Shelley*, and *Fitzherbert*, who required, he ſhould anſwer ſpecially how he had performed every one. The latter judge ſaid this manner of pleading had obtained within the laſt two years; but it was a corrupt method, and he ſhewed himſelf reſolved to ſet his face againſt it [p].

Action of covenant.

A POINT of pleading was much agitated on the occaſion of another action on bond for performance of covenants. The defendant pleaded that the indenture contained two

[o] Namely, by ſtat. 16 Car. I.

[p] 26 Hen. VIII. 5.

covenants,

CHAP. XXX.

HENRY VIII.

covenants, which he ſet forth, and ſhewed how he had performed them; he ſaid there were other covenants, and he recited them; but he added, that he was an unlettered man, and only the firſt two covenants were read to him, which he had performed, as beforementioned, therefore he prayed *judgment of the action.* To this the plaintiff demurred; and the judges were equally divided upon the concluſion of the plea; *Fitzherbert* and *Brudnell* holding the concluſion to be good, while *Pollard* and *Brooke* maintained the contrary. The queſtion was conſidered as turning upon this point, whether the indenture was void in the whole or in part. Thoſe who thought it was void only in part, held the concluſion of the plea to be good; for having actually ſealed and delivered it, he could not plead *non eſt factum*, and at any rate it was his deed, as far as he aſſented to the contents. The other two judges ſaid, that as only part was read to him, the whole was void; and therefore, after ſtating in his plea the ſpecial circumſtances, he ought to have concluded, *iſſint non eſt factum* [q].

Of *aſſumpſit* againſt executors.

THE action upon the caſe had become ſo common, and it had been found ſo generally applicable, that it was laid down by one of the judges in this reign, that where no other remedy was provided by the law, an action upon the caſe would lie [r]. Some intereſting points aroſe upon theſe actions, whether they were founded on torts, or contracts. It was not yet ſettled that the *aſſumpſit* would lie againſt executors. A caſe of this kind happened in 12th of the king: the teſtator had agreed to pay for goods, if the purchaſor did not; upon this promiſe the goods were delivered, and now an action was brought againſt the executors upon the promiſe. The report ſays, it was held by all the juſtices, that the plaintiff ſhould recover, for two reaſons; firſt, becauſe he had no remedy at law but by this action; ſecondly, becauſe the plaintiff had delivered

[q] 14 Hen. VIII. 25. [r] 14 Hen. VIII. 31.

the

the goods on the promiſe of the teſtator; and as there were ſufficient aſſets, *the teſtator's ſoul ſhould not be put in jeopardy* by the prejudice his promiſe had done the plaintiff. To this it was added by *Fineux*, chief-juſtice, that this did not come within the rule of *actio perſonalis moritur cum perſonâ*, which only applied to perſonal injuries. A quære is added by the reporter, whether, if the teſtator was living, this action would lie againſt him? or, whether he might wage his law in ſuch a caſe[s]?

THIS doubt prepares us for an obſervation made many years afterwards upon this deciſion. In the twenty-ſeventh of the king, it was demanded of *Fitzherbert*, whether a man might have an action upon the caſe againſt executors for a debt due by the teſtator; it ſeeming reaſonable, ſo long as they had aſſets, that they ſhould pay all the teſtator's debts. To this *Fitzherbert* anſwered, that he ſhould not have this action, nor any other; for, by the death of the teſtator, all debts due by ſimple contract died alſo. He ſaid, he was counſel for one Clement, in the twelfth year of the king, in an action upon the caſe againſt executors, (the ſame which we have juſt mentioned) and that *Fineux* and *Coningeſby* adjudged the action to be againſt the executors: But, ſays he, I take the law to lie clearly otherwiſe, and they did that without any advice, upon their own opinions merely. And when he was told that the caſe was reported in that year, he recommended it ſhould be expunged from the book, for it was certainly not law[t]. The learned judge does not give any reaſon for his opinion. An action of debt would not lie againſt executors for a ſimple contract debt, becauſe the teſtator might have waged his law; and the executors not having that privilege, it was thought reaſonable that they ſhould not be liable to any action. Perhaps he thought this new-fangled action ſhould not have greater efficacy

[s] 12 Hen. VIII. c. 11. [t] 27 Hen. VIII. 23.

than

CHAP. XXX.

HENRY VIII.

than the ancient remedy; and that the circumſtance of law-wager not lying in this action ſhould make no difference. Whatever were his reaſons, this opinion of *Fitzherbert* ſeems to have governed the courts in the remainder of this reign; for in the thirty-ſeventh year, it was agreed that this action would not lie againſt executors [u].

THE nature of *aſſumpſit*, and the diſtinction between this action and an action of debt, is a little explained by the following caſe. A man had come to the wife of the keeper of the compter, and promiſed, if her huſband would let one *Tatam* out of priſon, he would pay the debt to her huſband on ſuch a day, if *Tatam* did not. She related this to her huſband who agreed to it, and diſcharged *Tatam*; and upon the money not being paid, he brought an action of *aſſumpſit*, as of a promiſe to himſelf. This evidence was objected to, as not ſupporting the declaration; and it was argued in arreſt of judgment, that the action ſhould be debt and not aſſumpſit: but the whole court held the aſſumpſit to the wife to be ſufficient to charge the defendant to the huſband, and that the action was right. They ſaid, that the agreement of the wife in the abſence of the huſband was good till he diſagreed; like a feoffment to a wife, which would be good till the huſband diſagreed, and upon his agreement would be good for ever. Moſt acts of the wife might be thus ratified and made binding in law, by the huſband's confirmation. As to the action, tho' one of the juſtices thought that he might have either debt or aſſumpſit, yet the other three were of opinion that he could not have debt, but only this action. They ſaid, that debt would only lie where there was a contract; and in this caſe, as the defendant had not *quid pro quo*, the plaintiff could not have debt; but his claim was founded wholly on the *aſſumpſit*, which ſounds merely in covenant; ſo that if there had been a ſpecialty, he

[u] New Caſes, 7.

would

would have had a writ of covenant; but not having a ſpecialty, he could only have his action on the caſe. They recollected a caſe which had lately been adjudged, where a perſon came with a man to a baker, and deſired him to give the man ſome bread, and he would pay for it if the man did not; and a ſpecial action being brought upon this promiſe, it was adjudged, upon demurrer, that the action lay; and they ſaid that debt would not lie in ſuch caſe, becauſe there was no contract between the plaintiff and defendant [w].

An idea had prevailed, as has been juſt obſerved, that the action upon the caſe was a ſort of ſupplementary remedy to come in aid of ſuch perſons as could find no ſpecific remedy among the old writs. Conformably with that idea, it was argued by the counſel in this caſe, that as the plaintiff could have no action of debt, he ought by no means to be ſupported in this new writ: but the whole court denied this; and it was ſaid by one of the judges, that a perſon might chuſe which of two remedies he would rather purſue. Thus, if a perſon bailed goods to another, and they were deſtroyed, or ſpoiled, he might have his election between an action of detinue and one on the caſe. It ſhould ſeem from this reaſoning, as well as from the caſe juſt mentioned, that though this was a remedy peculiarly adapted to ſpecial caſes, grounded on *expreſs* promiſes, yet it had become the practice to bring this action for the recovery of ſimple contract debts, by ſtating the debt to ariſe upon a promiſe to pay, and then, when a debt was proved, conſtruing ſuch legal debt to *imply* a legal promiſe. When the validity of ſuch actions grounded only upon *implied* promiſes, was agitated in a ſubſequent reign, many records of this and an earlier period were produced, to ſhew that it was no new device;

[w] 27 Hen. VIII. 24.

but

CHAP. XXX

HENRY VIII.

but theſe precedents all paſſed *ſub ſilentio*; for there is no mention made of any ſuch in our books, unleſs the following may be conſidered as ſuch: for in the thirty-third of Henry the eighth, in an action upon the caſe, on an aſſumpſit to pay 10l. the defendant pleaded that he had waged his law in an action of debt for the ſame ſum; and this was held a good bar [x]. We find another action on the caſe, for that the defendant promiſed to pay 10l. which he owned to him for a horſe and cow [y].

To return to ſpecial actions of aſſumpſit. We find in the thirty-fourth of the king, an action of aſſumpſit on an inſurance of a ſhip: the declaration was, that whereas the plaintiff was poſſeſſed of certain wine and other merchandize in a ſhip, the defendant promiſed for 10l. to ſatisfy the plaintiff in 100l. if the ſhip and goods did not arrive ſafe. Beſides the form of action, which is alone to our preſent purpoſe, it may be remarked, that this action laid the goods, &c. to be in the pariſh of St. Dunſtan's in the Eaſt in London; and though in truth the bargain was made beyond ſea, yet they held it well; for in ſuch an action as this, which was not local, the place was declared to be immaterial [z]. There appears an action on the caſe, for that the plaintiff had delivered goods to the defendant, and the defendant had *promiſed* for ten ſhillings to keep them ſafe, but did not [a]. This ſeems to be another novel action of *aſſumpſit*.

AMONG actions upon the caſe for torts, we find the following. In an action for a nuiſance in ſtopping a river, ſo as to make it riſe on the neighbouring grounds, it was objected, that the proper remedy was by aſſiſe of nuiſance, and not by this action; and the whole court laid down this diſtinction: That where a man's way is ſtopped entirely, ſo as no paſſage remains, there the remedy is

[x] New Caſes, 5. Vid. S. P. 2 Rich. III. fol. 14.
[y] 33 Hen. VIII. New Caſes, 5.
[z] 34 Hen. VIII. New Caſes, 7.
[a] 26 Hen. VIII. New Caſes, 4.

by

by aſſiſe; but where only part is ſtopped, ſo that one may paſs with difficulty, there it is by action upon the caſe [b]. If a nuiſance was in the king's highway, and was therefore a public nuiſance, yet every one who received any particular damage therefrom, might ſtill have his action on the caſe [c]. Where an action was brought for words, in calling the plaintiff *heretic*, and one of *the new learning*, it was held clearly that it would not lie, being merely a ſpiritual matter; for if the defendant was diſpoſed to juſtify and ſhew in what reſpect the plaintiff was a heretic, the temporal court could not judge of it; and it was not like where the court had cogniſance of the principal matter, as where a man was called traitor, or felon. Again, if he had called him *adulterer*, this being a ſpiritual matter, an action would not lie for it. But *Fitzherbert* ſaid, that where things were of a mixt nature, as where a man was ſaid to keep a *bawdy-houſe*, he might elect whether he would have his action here or in the ſpiritual court. They added, that if an indictment of hereſy was found before any temporal judge, all he could do would be to certify it to the biſhop [d]. Though a defendant was allowed to juſtify, and ſay, that the charge was *true*, it was not enough to ſay, that it was the common report that he was a *thief* [e].

If there was any doubt, whether an action of *aſſumpſit* uſed at this time to be brought on *implied* promiſes, upon a buying and ſelling, inſtead of the action of debt; there is none, that an action had lately been framed to ſupply the place of that of *detinue*: for we find more than one inſtance of ſuch during this reign. Perhaps that juſt mentioned, where the defendant had promiſed for ten ſhillings to keep the plaintiff's goods ſafe, might be reckoned as one inſtance; for in the old law, that would have been a

Of trover.

[b] 14 Hen. VIII. 31.
[c] 27 Hen. VIII. 27.
[d] 27 Hen. VIII. 14.
[e] 26 Hen. VIII. 9. 27 Hen. VIII. 22.

CHAP. XXX.

HENRY VIII.

proper ſubject of detinue. But thoſe which ſeem to carry a ſtronger affinity to the action of detinue, were grounded not upon a *promiſe*, but a *tort*; and the declaration made much the ſame ſuggeſtion as that in detinue. Thus one of them charges, "that the defendant *found* the goods "of the plaintiff, and delivered them to perſons unknown:" another—"that whereas the plaintiff was poſſeſſed of cer-"tain goods, the defendant *found* them, and converted "them to his own uſe [f]." Another was, "that the goods of "the plaintiff came to the hands* of the defendant, "and he waſted them [g]." In this manner did the action upon the caſe, in one ſhape or other, ſpread itſelf over many of the old writs; and as it had now become applicable to the moſt uſual calls for legal enquiry, by being ſubſtituted in the place of debt and detinue, it grew every day more common.

THE ſtyle of pleading in actions upon the caſe continued much the ſame as in the former period. It was moſt uſual to deny that part of the declaration which *led* to the charge on the defendant; and ſometimes the plea ſtopped there; at other times, they would add a denial of the charge itſelf, by way of concluſion. This will appear from the following inſtances. Firſt, of *aſſumpſit*. In an action, which has been before mentioned, on the defendant's promiſe for ten ſhillings to keep ſafely goods delivered to him by the plaintiff, it was held by *Fitzherbert* and *Shelley*, that *non habuit ex deliberatione* was a good plea [h]. Again, in an action, for that the defendant promiſed to pay 10l. to the plaintiff, which he owed to him for a horſe that he bought of him; the plea might be, which ſum he hath paid to the plaintiff *abſq*; *hoc*, that he promiſed to pay 10l. which he owed to the plaintiff for a horſe; or *abſq*; *hoc*, that he *owed* 10l. to the plaintiff for a horſe [i]. This

[f] 33 Hen. VIII. New Caſes, 6.
* *Devenerunt ad manus.*
[g] 34 Hen. VIII. New Caſes, 6.
[h] 26 Hen. VIII. New Caſes, 4.
[i] 33 Hen. VIII. Ibid. 5.

latter

latter form of a traverſe confirms the idea, that they conſidered the *owing* and the *promiſing* to pay, as the ſame thing; and that where the *owing* was diſproved, the promiſe was likewiſe. In an action charging that the goods of the plaintiff came to the hands of the defendant, and he waſted them; the defendant pleaded, "that they did not "come to his hands;" and it was held good; upon which the defendant gave in evidence, that they were not the plaintiff's goods [k].

In an action for ſhaving *cum novaculâ immundâ et inſalubri*, the defendant pleaded that he did not ſhave the plaintiff *cum novaculâ immundâ et inſalubri modo et formâ* In another, for not taking care of a horſe, the defendant pleaded in the words of the declaration, that he did ſerve the horſe well and with care, *abſq*; *hoc*, that he ſerved it negligently and improvidently in the form the plaintiff had alledged. Again, for not curing a horſe, the farrier pleaded, that *non manucepit*, he did not undertake to cure it. For negligently keeping his fire, the defendant pleaded *quòd ipſe ignem ſuum prædictum ſalve et ſecurè cuſtodivit, abſq; hoc*, that he kept it ſo careleſsly and negligently, that his neighbour's houſe was burnt for want of his care [l].

Sometimes they would take the allegations of the declaration by proteſtation, and then conclude with a kind of general iſſue: as, in an action for deſtroying a bond intruſted to the defendant to re-deliver on requeſt; the defendant, *proteſting* that he re-delivered it unbroken and untorn, for plea ſaid, that he was in no wiſe guilty of the breaking and tearing of the writing obligatory [m]. Thus were pleas in caſe conceived upon the principle of a juſtification, in the way of a treſpaſs-pleading; and it was only by a traverſe, if ever, that the concluſion was pointed into ſomething like a full denial of the matter charged, and had

[k] 34 Hen. VIII. New Caſes, 6.
[l] Raſtell's Entrie's, 3. 26. 426. 8.
[m] Raſtell's Entries, 7.

CHAP. XXX.

HENRY VIII.

the effect of a general iſſue. It was an option in the defendant in moſt actions, whether he would plead the general iſſue of *not guilty*, or *non aſſumpſit*, as the caſe might be.

THE action of debt continued in its former ſtate, except that it was broke in upon, and ſuperſeded by the action of *aſſumpſit*, as has already been ſhewn. In the old law, this action had held a ſort of *diviſum imperium* over contracts with the action of accompt, which alſo in like manner with the former loſt ground in proportion as the *aſſumpſit* grew more into faſhion. The principal inducement to recur to the *aſſumpſit* inſtead of theſe writs, was to preclude the defendant from his wager of law: when, therefore, a tranſaction was ſo circumſtanced, that the law would not allow this privilege, there was no reaſon for going out of the ancient tract; and if the caſe was ſuch as to be within the compaſs of thoſe remedies, it was ſtill uſual to bring debt and accompt.

Debt and accompt.

IT therefore ſometimes happened as formerly, that a queſtion would ariſe, whether debt or accompt was the proper remedy in the matter in queſtion? A caſe of this kind happened in the twenty-eighth of the king, which furniſhed ſuch topics as will give a very good idea of the diſtinction then made between theſe two actions. *A.* had ſigned and ſealed a *bill* acknowledging he had received a ſum of money to lay out at Roan in French pruens, and ſee them ſafely ſhipped. Upon this an action of debt was brought againſt the executors of *A.* alledging that the money was not laid out in pruens: a verdict was found againſt the defendant; and though it was alledged in arreſt of judgment, that the proper remedy was accompt, and not debt, yet judgment was given, and a writ of error being brought, the ſame point was argued in the King's Bench, when the judgment was affirmed with the concurrence of *Fitzjames*, *Portman*, and *Spilman*, againſt *Luke*. The reaſons upon which the diſſenting judge ſupported his opinion were theſe. He ſaid, that where money was bailed for

for the buying of merchandize, if was clear if the money was not laid out that the action ſhould be accompt; both, for the money and the profit that had been, or might have been made by detaining the money; for he was a receiver and accountable, and no action of debt lay without a contract. Thus, ſays he, if I become debtor to you for the debt of *T. S.* this does not make me liable to an action of debt, for it is *nudum pactum*. So if I bail to you 2cl. to bail to *B.*; here *B.* for the ſame reaſon, cannot have an action of debt againſt you. However it might be queſtioned whether the *bill* would change the nature of the accompt into a matter of debt; but he thought not; though he admitted the force of ſome common caſes: as where a horſe was ſold, and the vendee made an obligation for the money, there the nature of the contract was determined, becauſe he was bound to pay the money according to the *obligatory words* in the bond: or where a judgment was recovered; for there the contract was gone, being changed into a thing of a higher nature. He admitted all this; but he ſaid this was a different caſe; for there were in this *bill* no *obligatory words*, nor any thing that purported to be an obligation; but the bill was merely a proof and teſtimony of the accompt; and *non eſt factum* would be no plea, as the action was founded upon the receipt to render accompt, and not upon the bill. He quoted a ſimilar caſe in the time of Henry VI. where a man brought an action of debt upon a contract before the mayor and recorder of London: the defendant there tendered his law: the plaintiff ſaid it was the cuſtom of London, that if a man put his ſeal to a paper, teſtifying a contract, he ſhould be ouſted of his law-wager; upon which the defendant demurred, whether the plaintiff had not by this plea abated his own action; and it was adjudged by the whole court that this well-maintained the action, and did not alter the nature of the contract, but was only a proof and teſtimony of the contract. He admitted, in the caſe at bar, that if the bill had gone on and ſaid, "if I

"fail

CHAP. XXX.

HENRY VIII.

"fail in laying out the money, it ſhall be redelivered to the "plaintiff," the word "re-deliver" would have amounted to ſomething obligatory, as had been adjudged in the time of Edward IV. But he thought this bill, as it had no obligatory words, was only a proof of the contract, and did not change the nature of it from accompt to debt.

THE juſtices, who were of a contrary opinion, argued in this way. They ſaid, that admitting there was no bill teſtifying the receipt, yet by the opinion of all the books, it was in the election of the bailor to have debt or accompt in ſuch caſe. They ſaid, it was ruled in the time of Edward III. that if money was bailed to another on condition that on the bailee making aſſurance of certain land by ſuch a day, he ſhould retain the money for ever; but on not doing ſo, he ſhould re-deliver it; if the condition was not performed, he was either accountable or a debtor, at the election of the bailor. It muſt be the ſame, if money was given to merchandiſe with, or to bail over, as to give in alms; the money in ſuch caſes is the bailor's, till it is given according to the truſt; and he may countermand the gift, and have debt for the money. But *Fitzjames* thought, in this caſe, the property of the money was in the bailee till it veſted in the bailor, by the non-performance of the truſt. They ſaid further, that if money was bailed to one to keep for the uſe of the bailor, and it was not contained in a bag or box, detinue would not lie, becauſe the money could not be diſtinguiſhed; but the party might have debt or accompt. They ſaid, if plate was bailed to a perſon, and he altered it, the bailor might have either detinue or an action upon the caſe. They mentioned this to have been decided in the time of Edward IV. And in the time of *Frowike*, chief-juſtice, they ſaid the following point was argued and ruled: A man bought twenty quarters of corn to be delivered at ſuch a time and place; the vendor did not perform the contract, ſo that the vendee being a brewer, was obliged to buy corn elſewhere, at a greater price. It was ruled, that the

vendee

vendee might have his action upon the case, and also debt, for the corn; but not detinue, because the property could not be known: so that they thought, in the present case, it was very reasonable that the plaintiff should have his opinion of two actions.

As to the bill, and the form of it, they said, that if it was in these words, "this bill witnesseth that *A* borrowed "10l. of *B.*" without any thing more, this would charge the executors the same as an obligation, and the testator would not have been permitted to wage his law against it. Any memorandum of owing money, or of an accompt or an acknowledgment of a balance due, if sealed and delivered as a deed, would be a good obligation in law. Every man's deed was to be taken most strongly against himself.

They thought that, in this case, the plaintiff could not have accompt against the executors, because they were not privy to the transaction, and that debt was the proper remedy. They therefore affirmed the judgment; and an injunction which had been obtained in chancery was likewise dissolved; so that this matter was, in one shape or other, determined in three courts [n].

We have frequently observed, that, in debt, detinue, and accompt, the defendant was allowed his law-wager in certain circumstances, but not in others. How this stood at present, and the manner of pleading in these actions, is worthy of notice; because we shall see afterwards that this consideration had great influence in settling the method of pleading in the new actions upon the case that were substituted in their stead. It was laid down, almost in the same way as the law had been understood for several years, that in detinue on a bailment by the hands of another, the defendant might wage his law, *because* he shall not answer to the bailment, but only to the detinue: the same in debt

[n] 28 Hen. VIII. Dyer, 20. 118.

upon

CHAP. XXX.

HENRY VIII.

upon a contract by the hands of another; though it would* be otherwiſe in accompt by the hands of another: and the reaſon they admitted this difference in accompt was, becauſe the receipt might be traverſed; from which we are to collect, that it could not in the two former actions[o]. Again, *Fitzherbert* laid down this difference: where a man came to the poſſeſſion of goods by bailment, and where by *trover* or finding. In the firſt caſe, he was chargeable by force of the bailment only; and if he bailed them over, or they were taken from him, yet he was ſtill chargeable to his bailor by virtue of the bailment. But if he came to them by trover, he was only chargeable on his poſſeſſion; and if he was lawfully out of poſſeſſion of them before he who had right brought his action, he was not chargeable. For this reaſon, in detinue grounded upon a bailment, it would be a good plea for the defendant to ſay he found the goods and delivered them to *J. S.* before the action brought; and he might traverſe the bailment. Though *Shelley* did not quite aſſent to this concluſion, yet he agreed with him, that in many caſes the bailment was traverſable in detinue; and he added, that the *trover* alſo was traverſable in ſome caſes: but this was denied by *Fitzherbert*[p]. On another occaſion it was laid down by the ſame learned judge, that in accompt, on receipt by his own hands, even though a deed was ſhewn teſtifying the receipt, yet the defendant ſhould be admitted to wage his law; the ſame in detinue; for notwithſtanding the bailment was by deed, yet the detinue is the cauſe of action[q]. To reconcile what is here ſaid of detinue with what was laid down by *Fitzherbert* before, he muſt be ſuppoſed to mean here a bailment by the hands of another; and that this, though proved by a deed, might yet be diſcharged by wager of law, becauſe he was, according to what is here ſaid, only to anſwer to the detinue. Theſe rules will be found to govern the

* Vid. ant. vol. III. 405.
[o] 18 Hen. VIII. 3.
[p] 27 Hen. VIII. 13.
[q] 27 Hen. VIII. 22.

plead-

pleading in the new actions upon the caſe, which have juſt been mentioned as coming in the place of detinue and debt.

THE alterations made by ſtatute in the criminal law during this reign were very many and very important: the determinations of the courts may be compriſed in a ſmaller compaſs. There are ſome which are worthy of obſervation.

The criminal law.

THE principle which governed the parliament in the beginning of Edward III.'s reign [r], when they declared it unlawful to kill an outlaw, ſeems to have had no influence with that aſſembly in a ſimilar caſe at this time. In 24 Hen. VIII. [s] it was agreed in parliament, that it was not felony to kill a man attainted in a præmunire; for, ſays the report, ſuch a one is out of the king's protection, which is the ſame as if he was out of the realm and government of the king; though it would be otherwiſe of one attainted of felony.

Manſlaughter.

A MAN was arraigned upon an indictment for murder: upon the trial, the jury found him not guilty of the murder, but guilty of homicide or manſlaughter; and the judgment given in the king's bench was, that he ſhould be hanged. Another caſe of the ſame kind was determined in the ſame way by all the judges. The reaſon given by the report is, that manſlaughter is comprehended in murder [t]. From this one ſhould be led to conclude, that the preciſe meaning of murder, as diſtinguiſhed from other killing, was not yet defined; nor indeed did there ſeem to be any direction by which a line could be drawn, till ſtat. 23 Hen. VIII. had taken away clergy from *murder with malice prepenſe*; the form of which expreſſion ſeems to intimate that there might be a murder without malice prepenſe. It is certain that, after this act, murder was more exactly defined as to its legal import; though the diſtinction plainly marked

[r] Vid. ant. vol. II. [s] Bro. Cor. 197. [t] Bro. Coron. 222.

out

CHAP. XXX.

HENRY VIII.

out by this ſtatute was not obſerved by the courts for ſome time, as we ſhall again ſee in the reign of queen Mary.

If many perſons were concerned in the commiſſion of an unlawful act, and a murder was committed by one, all were conſtrued to be principals in the fact. Thus, if twelve or more were to do a robbery, make a riot, affray, or the like, and one of them entered into a houſe and killed a man, the others were all principals in the murder. Such was the caſe of the Lord *Dacres*, who (together with *Mantel* and others) was executed, becauſe one of the company killed a man as they were hunting together [u]. It was held, that if a man was killed in jouſting, or in play with ſword and buckler, it was felony, notwithſtanding it had been at the command of the king [x].

It had been agreed by the juſtices of both benches, that in an appeal of murder the defendant ſhould not be permitted to plead that the deceaſed aſſaulted him, and that he killed him *ſe defendendo*; but ſhould plead not guilty, and give the ſpecial circumſtances in evidence; and if it appeared ſo to the jury, they ſhould acquit him. Nor was he allowed to have this plea, with a traverſe of the murder; for the matter of the plea was murder (ſays the book): murder could not be juſtified, and the traverſe could not ſtand when the inducement to it failed [y]. The way, therefore, was to plead the general iſſue. A queſtion had ariſen upon ſtat. 31 Hen. VIII. which made it high-treaſon to poiſon any one. A woman had poiſoned her huſband, and the heir brought an appeal of murder. It was contended, that the leſſer offence was merged in the greater, and therefore that an appeal would not lie; and ſo it was held by the court [z].

Some queſtions aroſe on the nature of larceny. In the eighteenth year of the king, it was propounded by the chancellor to all the juſtices, whether if a man took pea-

[u] Keilw. 161. 34 Hen. VIII. Bro. Cor. 171.
[x] Bro. Cor. 228.
[y] New Caſes, 21.
[z] 31 Hen. VIII. Dy. 50. 4.

cocks,

cocks, that were tame and domeſtic animals, it was felony. The opinion of *Fitzherbert* and *Engleſield* was, that it was no felony; becauſe they were *feræ naturæ* as much as doves in a dove-houſe; and if the young of ſuch doves were taken, it was no felony. The ſame of herons taken out of the neſt; of ſwans, bucks, hinds, which were domeſticated; or hares taken out of a garden ſurrounded with a wall; the ſame of a maſtiff, hound, or ſpaniel; or goſhawk reclaimed; for they were more for pleaſure than profit; which was the caſe with a peacock. They agreed, that fruit taken from a tree, or the cutting of trees or corn, was not felony; though it would be different, if they were before ſevered. However, *Fitzjames* and the other judges were of opinion, that peacocks were of the ſame nature with hens, capons, geeſe, or ducks, of which the owner had property, they having *animum revertendi*, unlike fowls of warren, as pheaſants, partridges, and conies, of which it was clear no felony could be committed; ſo that it was at length agreed that felony might be committed of peacocks[a]. A queſtion aroſe upon the ſtat. 21 Hen. VIII. c. 7. concerning ſervants embezzling their maſters' goods. It was aſked, if a perſon delivered an obligation to his ſervant to receive the money due upon it, and the ſervant received and went away with it, converting it to his own uſe, whether this was within the meaning of the ſtatute; and it was thought not, becauſe no goods were delivered, an obligation not being a valuable thing, but a choſe in action. And *Engleſield* ſaid, if a perſon delivered to his apprentice wares or merchandize to ſell, and he ſold them, and went away with the money, this was not within the ſtatute; becauſe he had the money by the delivery of his maſter, nor did he go away with the thing delivered to him. Yet if one of my ſervants delivers my goods to another of my ſervants, this ſhall be conſidered as my delivery; and if he goes off

[a] 18 Hen. VIII. 2.

with

CHAP. XXX.

HENRY VIII.

with them, it is within the ſtatute. And *Fitzherbert* ſeems to have doubted whether obligations might not be conſidered as goods within the act; for a gift of *omnia bona et catalla* would paſs all obligations [b].

If the practice of juſtices of the peace was agreeable to what was laid down for law in our courts, they muſt have been of very little uſe in aſſiſting towards bringing offenders to juſtice. Upon a juſtification under the warrant of a juſtice, in 14th of the king, it was ſaid by *Fitzherbert*, that a juſtice of the peace could not make a warrant to take a man for felony, unleſs he was before indicted. *Brudnell*, the chief-juſtice, aſſented to this; but ſaid he might make a warrant for keeping the peace. *Brooke* ſaid, that the juſtice could not even take one for ſuſpicion of felony, unleſs upon a ſuſpicion of his own; much leſs could he make a warrant for that purpoſe. But they all agreed in holding the officer juſtified; for a juſtice being a judge of record, and having a ſeal of office, the bailiff was not to diſpute his authority, but give obedience to the command of the warrant, and execute it [c]. After all, it ſhould ſeem that a warrant for the peace, which the judges here pronounced to be lawful, might, without any ſtrained fiction, be iſſued againſt felons, and anſwer all the purpoſe of apprehending for felony.

Of trials in two counties.

The old debate upon the locality of trial was not yet quieted. A man died in the county of Cambridge of a ſtroke he had received in another county, and the heir brought an appeal in the county of Cambridge. The court of king's bench were of opinion, that the jury ſhould come from both counties, according to a caſe in the time of Henry VII. Upon this, it was obſerved by the clerks, that if a man died in London of a ſtroke received in Middleſex, the trial, according to common practice, was by a jury of Middleſex. The court ſaid that

[b] 26 Hen. VIII. Dyer, 50. 2. [c] 14 Hen. VIII. 16.

was

was a different caſe, becauſe London and Middleſex could not join [d]. In theſe caſes no *niſi prius* uſed to be awarded, but the jurors of both counties were obliged to come up to the king's bench. A ſimilar queſtion had ariſen, a few years before, on an appeal for a robbery. The robbery was laid in Wiltſhire, and the procurement and abetting in London: the appeal was brought in Wiltſhire againſt the acceſſaries, and it was objected to for that reaſon. After much argument on both ſides, the opinion of the court was, that the appeal ſhould abate. They laid it down as an eſtabliſhed point of law, that where the tort commenced, there the action ſhould be brought. They admitted, that where goods were taken felonioufly in one county, and carried into another, the appeal might be in either, becauſe the property was never diveſted out of the poſſeſſor; but it was otherwiſe where goods were ſo taken by a treſpaſſor, for there the property was in the treſpaſſor by the taking, and diveſted out of the owner; ſo that the action muſt be in the firſt county, where the treſpaſs was alone committed. They put the caſe of a ſtroke in one county, and the death in another; but ſaid, that in this caſe there could not be a trial in both counties, becauſe thoſe of London could not join with foreigners, as had been laid down in the former caſe [e]. The offence of the acceſſary was therefore conſidered ſo ſeparate and diſtinct from the other, that he was to be proceeded againſt where he committed his crime.

THE above were inſtances of joining juries of different counties, where an appeal was brought, and the iſſue was to be tried. But we find it laid down, generally, that not only an appeal, but an indictment, might be brought in either county, where the goods were ſtolen in one county, and carried into another [f], upon the ground of its being a felony in both counties. The above caſe of the acceſſary, where a difficulty certainly remained, and the other points

[d] 32 Hen. VIII. Dyer, 46. 8.
[e] 29 Hen. VIII. 38. 50.
[f] 34 Hen. VIII. New Caſes, p. 73.

of

CHAP. XXX.

HENRY VIII.

of ſtealing and killing in two counties, which were not ſettled to the mind of every lawyer, occaſioned an act in the next reign, which has directed how trials ſhould be had in ſuch caſes in future.

The eccleſiaſtical court.

WHILE the king and parliament were engaged in deſtroying the Pope's authority, the juriſdiction and practice of the eccleſiaſtical court was not leſs queſtioned by all ranks of perſons. The proceedings for hereſy were carried on with ſuch zeal as to be open to much odium, and the courſe in which thoſe matters were conducted, was thereby more expoſed to obſervation and cenſure. The branch of the eccleſiaſtical practice which was viewed with moſt jealouſy, was the proceeding *ex officio*. This method of proſecution was conſidered by the common-lawyers in no better light than an abuſe of all law and juſtice. It was, on the other hand, defended by the authority of preſcription, and upon grounds of expediency. Theſe topics were very fully diſcuſſed in print by perſons of ability and eminence. The chief of thoſe who entered into this controverſy, were St. Jermyn, and Sir Thomas More; the former carrying on the attack, whilſt the latter defended the eſtabliſhed order of proceeding.

ON the one hand, it was complained, that perſons were brought before the ſpiritual judge for hereſy, without knowing who had accuſed them; and were thereupon obliged, ſometimes to abjure, ſometimes to do penance, or pay great ſums for redemption thereof; all which grievances were aſcribed wholly to the judge and officers of the court, who were the only perſons viſible to the parties ſuffering. It was contended to be a heavy oppreſſion, that a perſon brought *ex officio* before the ordinary, under ſuſpicion of hereſy, ſhould be compelled to purge himſelf at the will of the ordinary, or be accurſed; which was, in a manner, inflicting a puniſhment without proof, or without an offence.

IN anſwer to this it was urged, that if convening heretics *ex officio* was no longer to be practiſed, and no courſe

was

was to be taken but that of a formal accuſation, it could not be expected that proſecutions ſhould ever be made for hereſy. Many, ſaid they, will give ſecret information to a judge, who would not dare to ſtand forth as parties to accuſe; and, if brought againſt their wills as witneſſes, would readily enough give evidence: this might be obſerved not only in hereſy, but in felonies, and other crimes. They adduced inſtances from the practice of the common law, equally hard on an innocent perſon, and ſimilar with this proceeding. How often, ſays Sir Thomas More, do the judges upon ſuſpicion award a writ to enquire of what fame and behaviour a man is in his country, who lies in the mean time in priſon till the return? If he be returned good, that is, if he be in a manner purged, then he is delivered on paying his fees; if he is returned naught, then he is bound to his good abearing. The ſame where a man was indicted, and no evidence was given openly at the bar, as many times happened; for the indictors might have evidence given apart, or might have heard of the fact before they came there; and of whom they heard it, they were not bound to diſcloſe, but rather to conceal, being ſworn to keep the king's counſel, and their own. In ſuch caſe, who is to tell the priſoner the names of his accuſers, to intitle him to his writ of conſpiracy? It is in vain to ſay that the indictors were his accuſers, and them he knew, for he could have no redreſs againſt them for his undeſerved vexation. And if it was ſaid, that the proceeding of theſe twelve men, without open accuſers, was leſs liable to exception than that of a ſingle judge, the learned chancellor anſwers, that in his experience he never ſaw the day, but he would as well truſt the truth of one judge, as of two juries. He thought it therefore a right conduct in judges, without any open information, but merely on general rumour, or ſecret intimation, to bind, as they frequently did, a troubleſome man to his good abearing. And he ſays himſelf, that he,

while

CHAP. XXX.

HENRY VIII.

while chancellor, had often put perſons out of the commiſſion of the peace on ſecret information.

UPON the whole, when it is conſidered that hereſy was the firſt offence given in charge at every ſeſſion of the peace and of gaol-delivery, and in every leet throughout the realm, and no proſecutions are there inſtituted, it ſeemed probable, that without ſome ſecret proceeding like that *ex officio*, the crime would go intirely without puniſhment [g].

SUCH were the arguments for and againſt this point of eccleſiaſtical juriſprudence, which, notwithſtanding all oppoſition and animadverſion, continued to maintain its ground.

King and government.

HENRY VIII. was a man of ſome learning, and diſcovered no ſmall degree of induſtry on ſubjects where he had much intereſted himſelf: this appears by his book againſt Luther, of which it is generally agreed he was the author. He gave ſome attention to buſineſs. The preamble and material parts of the bill for empowering him to erect the new biſhoprics, were drawn by the king himſelf; and the firſt draught of it is ſtill extant in his own hand. There are likewiſe ſome minutes of his relative to the biſhoprics he then had in contemplation to erect [h].

THRO' the whole of this prince's reign, he ſeems to have enjoyed the full gratification of his abſolute will and caprice. A concurrence of events had produced a ſtate of things which enabled him, beyond the example of any of his predeceſſors, to tyrannize over all ranks of men, and over the laws themſelves; or, when that was not ſafe, to cauſe ſuch laws to be made as would warrant and legitimate every act of power.

THO' the parliaments of this king were obedient to his commands in moſt points, yet in the article of taxation he ſometimes met with diſappointment. In conſideration,

[g] Sir Tho. More's Works, 907. 995. 1012. [h] Burn, Ref. vol. I. 250.

perhaps,

perhaps, of their numberleſs other compliances, the king endured this with patience; never failing to try all means of keeping on good terms with an aſſembly which he was generally able to make the inſtrument of his deſigns.

In the 14th year of his reign he iſſued privy-ſeals, demanding loans. He carried this ſcheme of arbitrary taxation ſtill further; he publiſhed an edict for a general tax, which, however, he ſtill called a loan; and under that pretence levied 5s. in the pound on the clergy, and 2s. on the laity. In the ſame year when a parliament had been called, and they had made him a grant payable in four years, he would not content himſelf with the terms the legiſlature had preſcribed, but levied the whole in one year [i].

Not content with this, about two years after, he iſſued commiſſions into every county, for levying 4s. on the clergy, and 3s. 4d. on the laity. But finding ſome reſiſtance to this attempt, he thought it adviſable to ſend letters to every county, declaring that he meant no force by this impoſition, and that he would take nothing but by way of *benevolence*. Mean while the courtiers ventured to contend, that the ſtatute of Richard III. againſt benevolences, as it was made by an uſurper and a factious parliament, could not bind an abſolute monarch, who held his throne by hereditary right. The judges went ſo far as to affirm, that the king might exact by commiſſion any ſum he pleaſed [k].

When doctrines like theſe were propagated from authority, the king was encouraged in renewing at different times theſe arbitrary taxes. The houſe of commons were ſo far from remonſtrating, that they twice paſſed acts for the remiſſion of debts which the king had contracted by theſe loans; in the laſt of which they inſerted a clauſe, requiring that ſuch as had already obtained payment, in the whole or in part, ſhould refund to the exchequer [l].

[i] Hum. vol. IV. 46, 48. [k] Ibid. 61. [l] Ibid. 243.

CHAP. XXX.

HENRY VIII.

NOTWITHSTANDING this injuſtice, he ſucceeded the ſame year in ſoliciting new loans. Beſide this, he enhanced the price of gold and ſilver, under pretence that it ſhould not be exported; he coined baſe money; and appointed commiſſioners to levy a benevolence, which was by no means unfruitful. An alderman of London, not contributing according to the expectations of the commiſſioners, was inrolled as a foot-ſoldier for the Scottiſh war; others were impriſoned: ſo that the king, by his prerogative, exerciſed an abſolute controul over the perſons and property of all his ſubjects [m].

ALL this was owing to the tameneſs or ignorance of parliament: overawed by the firmneſs of Henry, unacquainted with the extent of their privileges, and the principles of the conſtitution, they were unable to afford the people any protection. The following is an inſtance how little notion they had of a legal government. The duty of tonnage and poundage had been voted to former kings for life; but Henry levied it ſix years without any renewal of that grant to himſelf: and though four parliaments had ſat during that time, none of them complained of this as an infringement; on the contrary, when they paſſed ſtat. 6 Hen. VIII. c. 14. to give this tax to the king for life, they complain that he had ſuſtained loſſes by thoſe who had *defrauded* him of it [n].

IN the ſame way muſt we account for that extraordinary ſtatute, by which the parliament ordained, that the king's proclamations ſhould have the force of laws [o]. To ſecure the execution of this act, another [p] was afterwards made, appointing that any nine counſellors ſhould form a legal court for puniſhing all diſobedience to proclamations. By theſe two ſtatutes the king was, in effect, made abſolute, and maintained in his own perſon compleatly the legiſlative and executive power of the ſtate.

[m] Hum. vol. IV. 245.
[n] Ibid. 272.
[o] Stat. 31 Hen. VIII. c. 8.
[p] Stat. 34 Hen. VIII. c. 23.

THE

THE authority given by ſtat. 28 Hen. VIII. c. 17. may be reckoned among the ſingular aggrandizements of royal authority in this reign. That ſtatute enabled any one inheritable to the crown, as limited by Henry VIII. to repeal, after his age of twenty-four years, all ſtatutes to which he had conſented before that age.

THIS reign affords many inſtances of extraordinary power exerciſed as well by ſubjects as by the king. In the 9th year of his reign, the king procured from the Pope the legatine commiſſion for Wolſey, with the power of viſiting all the clergy and monaſteries, and that of ſuſpending all the laws of the church during a twelvemonth[9]. This was a great authority; and Wolſey, to ſecure the execution of it, eſtabliſhed an office, which he called the *Legatine Court*. This new court exerciſed certain cenſorial powers, not only over the clergy, but alſo over the laity. It enquired into matters of conſcience; into cauſes of public ſcandal; into conduct, which, though out of the reach of the law, was contrary to ſound morals. The cardinal went further, and aſſumed the juriſdiction of all the biſhops' courts, particularly that over wills and teſtaments; he alſo preſented to priories and benefices, diſregarding all rights, whether of election or patronage.

THE courts of law gave the firſt blow to theſe great powers. *Allen*, an inſtrument of the cardinal, who uſed to ſit as judge in this court, was convicted of malverſation; and the legate thenceforward thought proper to be more cautious in diſplaying his judicial authority.

THE new appointment of *Vicar-General*, conferred on Cromwell ſome years after, delegated to that officer the king's whole authority over the church, as ſupreme head thereof. This, tho' not ſo extenſive as that exerciſed by Wolſey, and in the hands too of a more diſcreet man, was yet a very eminent ſtation; and being created for the pur-

[9] Hum. vol. IV. 15.

CHAP. XXX.

HENRY VIII.

pose of making a rigorous inquisition into the state of the religious houses, gave Cromwell an unlimited sway. At one time, he published, in the king's name, an ordinance, retrenching many gainful superstitions, abrogating many of the popish holidays, ordering incumbents of parish-churches to set apart a considerable portion of their incomes for repairs, for maintaining exhibitioners at the university, and the poor[r]; all which he did without the sanction of parliament or convocation.

As if every consideration and every article of life was to depend on arbitrary will, the king had appointed a commission, consisting of two archbishops, several bishops, and some doctors of divinity, to chuse, among the variety of tenets then promiscuously held, a form of religion for the kingdom. These commissioners had not made much progress in their undertaking, when the parliament, in 1541, made an act, ratifying all the opinions which they should *thereafter agree upon with the king's assent*; provided only, that they established nothing contrary to the laws and statutes of the realm[s].

If Henry was regardless of law in elevating and maintaining his ministers in extraordinary authority, he was equally void of justice in animadverting on them. Wolsey, by exercising his legatine authority, had incurred the statute of *præmunire*. Tho' this was by the procurement of the king himself, and had been acquiesced in by the parliament and nation for some years, he did not scruple to suffer a sentence of præmunire to pass on the cardinal, but executed part of it very readily, almost in person, by taking possession of his immense property in houses, furniture, and other valuables[t]. The king went further: he pretended the whole church had incurred the same penalty, by submitting to this papal authority; and the attorney-general had begun to proceed against them formally by indict-

[r] Hum. vol. IV. 170. [s] Ibid. 222. [t] Ibid. 94.

ment.

ment. To avert the king's reſentment, they voted him a great ſum of money, made *their humble ſubmiſſion* to him, acknowledged him to be the protector and ſupreme head of the church and clergy of England; and for theſe condeſcenſions obtained a pardon [u].

THE houſe of commons now grew apprehenſive that they alſo ſhould be obliged to purchaſe a pardon for their ſubmiſſion to the legatine authority. They therefore petitioned the king for a remiſſion of this offence to his lay ſubjects: and ſome time after a general pardon was iſſued for all the laity [x].

THUS did the king himſelf encourage and promote a breach of the law; and afterwards turn the delinquency of his ſubjects to his own emolument.

HENRY was not contented with this ſovereign dominion over law and juſtice; he attempted to govern impoſſibilities, and reconcile the plaineſt abſurdities, by means of the omnipotence of parliament. It being thought proper to make ſome alteration in the oath againſt the Pope's authority, certain oaths were deviſed, more comprehenſive and preciſe, to be taken in future; and by the ſame ſtat. 35 Hen. VIII. c. 1. it is provided, that they who have already ſworn the former oaths, or any of them, *ſhall take and eſteem it of the ſame effect and force* as tho' they had ſworn this: thus the taking of one oath is made by act of parliament equivalent to the taking of another. In the ſecond act of ſucceſſion, ſtat. 28 Hen. VIII. c. 7. ſect. 24. there is a repeal of the former act of ſucceſſion; and the oath taken under it was now to be diſpenſed with; the following words were therefore added to the new oath: "*And* "*in caſe any other oath be made, or hath been made by you to* "*any perſon, that then ye are to repute the ſame as vain and* "*annichilate.*" The like clauſe was added to the oath in which the Pope's authority was renounced, which was or-

[u] Hum. vol. IV. 106.

[x] Ibid. 107.

dained

CHAP. XXX.

HENRY VIII.

damned by ſtat. 28 Hen. VIII. c. 10. and the like was inſerted in the ſecond oath above alluded to, for renouncing the Pope's authority.

If we are to judge of the general adminiſtration of criminal law in this reign, from the trials that have come down to us of eminent perſons, it appears that the lives of the people were entirely in the hands of the crown. A trial ſeems to have been nothing more than a formal method of ſignifying the will of the prince, and of diſplaying his power to gratify it. The late new-invented treaſons, as they were large in their conception, and of an inſidious import, by giving a ſcope to the uncandid mode of enquiry then practiſed, enlarged the powers of oppreſſion beyond all bounds.

The caſe of Sir Thomas More is a ſtrong inſtance how little anxiety there was to eſtabliſh a capital charge by plauſible proofs, and the little probability there could be of eſcaping conviction. It had been made treaſon to endeavour to deprive the king of his titles: the title of Head of the Church had been conferred on him by parliament; ſo that a denial of that title was treaſon under the new ſtatute. After an impriſonment of near fifteen months, Sir Thomas was brought to a trial for this offence. The indictment was ſo long, and charged ſuch a variety of matter, he ſaid, he could not remember a third part of what was objected againſt him. They then proceeded to proofs. His examination in the Tower by certain lords, was conſidered as evidence ſufficient to ſupport the charge; tho' it amounted to nothing more than a refuſal to anſwer or diſcuſs ſuch queſtions as concerned the King's or Pope's ſupremacy: nor was it till after he had entered on his defence, that Mr. Rich (afterwards lord Rich) and ſome others were examined *vivâ voce*. Upon ſuch evidence he was convicted, to the entire ſatisfaction of the chancellor, who preſided; and who emphatically expreſſed his approbation

bation of the verdict in the words of the famous Jewish magiſtrate, *Quid adhuc deſideramus teſtimonium, reus eſt mortis* [y].

THE only charge againſt Anna Boleyn which was ſupported with the leaſt degree of proof, was, "that ſhe had "affirmed to her minions, that the king never had her "heart; and that ſhe had ſaid to each of them apart, that "ſhe loved him better than any perſon whatſoever." This was held *a ſlandering of the king's iſſue begotten between the king and her*; one of the new-made treaſons, and, what is very remarkable, deſigned originally for the protection of her own character, and of that of her progeny [z].

LORD Surrey was indicted of treaſon. We are ignorant what was the tenor of the indictment; but the evidence againſt him was, that he entertained ſome Italians in his houſe, who were *ſuſpected* to be ſpies; that a ſervant of his had made a viſit to cardinal Pole, in Italy; and that he had alſo quartered the arms of Edward the Confeſſor; one of which was thought ſufficient evidence of his keeping up a correſpondence with that obnoxious prelate; the other was judged an indication of his aſpiring to the crown; though he and his anceſtors during the courſe of many years, had done the ſame, and were juſtified in it by the authority of the heralds. Such were the facts upon which this accompliſhed nobleman was convicted by a jury, and was accordingly executed [a].

IN the criminal proſecutions of theſe times, there are two things worthy of obſervation: firſt, the ſlight facts which were conſidered as proofs of a charge; ſecondly, the ſlight evidence which was allowed to eſtabliſh thoſe facts: an obſervation which may be made as well upon proceedings at common law, as upon the more deciſive way of condemning perſons in parliament.

THE favourite way of proceeding againſt ſtate criminals was by bill of attainder. This extraordinary judgment

Bills of attainder.

[y] Stat. Tri. vol. I. [z] Hum. vol. IV. 159. [a] Ibid. 214.

was

CHAP. XXX.

HENRY VIII.

was reſorted to according to the occaſion; either to confirm a ſentence already paſſed in ſome court of law, or to enſure the deſtruction of ſuch as might poſſibly eſcape by the openneſs of a common-law trial. Thus the ſentence againſt Empſon and Dudley, upon a flimſy charge of treaſon, was confirmed by bill of attainder; as was that againſt the marquis of Exeter, the lords Montacute, Darcy, Huſſey, and others, who had all been formally tried. Theſe, as they ſucceeded a regular trial and condemnation at law, were not ſo exceptionable as the attainders of Sir Thomas More and biſhop Fiſher for miſpriſion of treaſon; which, perhaps becauſe a caſe that did not extend to life, they ventured on without the examination of witneſſes, or hearing them in their defence. On the other hand, in a capital caſe, the Maid of Kent and her accomplices were all examined in the ſtar-chamber, though not in parliament, before the bill of attainder paſſed upon them [b]. This examination of witneſſes in the ſtar-chamber was probably in order to try the ſtrength of the evidence, and to determine in what way to proceed; though we do not find, that the reſult of ſuch examination was always laid before parliament to enable them to form a judgment on the propriety of that to which they were called upon to aſſent. The privy-counſellors had taken their reſolution; and if they were ſatisfied, the houſes ſeldom concerned themſelves as to any further enquiry.

THE attainders in parliament which we have hitherto mentioned, were carried through with moderation and juſtice, compared with thoſe which followed. In the 29th year of his reign, Henry introduced a new practice of attainting perſons. The counteſs of Saliſbury had become extremely obnoxious to him, on account of her ſon, cardinal Pole; and nothing was more deſired by Henry than to take her off. Various accuſations were framed againſt her; that ſhe hindered the reading of the new tranſ-

[b] Burn. Ref. vol. I. 146.

lation

ſlation among her tenants; that ſhe procured bulls from Rome, which were ſaid to be found in her houſe; and that ſhe kept up a treaſonable correſpondence with her ſon. Theſe charges, however, could not be ſufficiently proved, might be invalidated by her, or would not reach her life. This determined the king to procure her deſtruction in a more deciſive and ſummary way than had been hitherto uſed. For that purpoſe he ſent Cromwell to conſult the judges, whether the parliament could attaint perſons who were forthcoming, without trial, or citing them to appear and defend themſelves[c]. The judges anſwered, that it was a dangerous queſtion; that the high court of parliament ought to give the example to inferior courts of proceeding according to juſtice; no inferior court could act in that arbitrary manner, and they thought the parliament never would. But being required to give a more explicit anſwer, they ſaid, that if a perſon was attainted in that manner, the attainder could never afterwards be brought in queſtion, but muſt remain good in law. As Henry did not want his judges to determine how juſt, but only how effectual this proceeding, ſo conducted, would be; he was ſatisfied with their anſwer, and reſolved to avail himſelf of it againſt the counteſs.

A BILL was brought into the houſe of lords to attaint her of treaſon. The only thing like proof before the parliament was, that Cromwell ſhewed to the houſe a banner, on one ſide of which were embroidered the five wounds of Chriſt, the ſymbol choſen by the northern rebels; on the other ſide, the arms of England; which banner he ſaid was found in the houſe of the counteſs. This was conſidered as an evidence of her approving that rebellion.

FIFTEEN others were attainted in the ſame act; ſome of them, who were friars, for ſaying, "that venomous "ſerpent the biſhop of Rome was ſupreme head of the "church of England;" others for treaſon in general, no

[c] Hum. vol. IV, 198.

particular

CHAP. XXX.

HENRY VIII.

particular fact being ſpecified. There is no appearance that witneſſes were examined againſt any of them; if they were, it probably paſſed in the ſtar-chamber, for none are mentioned in the Journals. The haſte with which this famous bill paſſed, is not, of all circumſtances attending it, the leaſt remarkable; it was brought in the 10th of May, was read that day the firſt and ſecond time, and the third next day. In the ſame year, the abbots of Reading, Colcheſter, and Glanſtonbury, were in like manner attainted of treaſon by bill [d].

AFTER the precedent had been introduced, they went on through the whole of this reign attainting perſons in a ſummary general way; the number of which attainders it would be tedious and diſguſting to recount [e]. The moſt ſtriking inſtance of theſe was, when this engine of tyranny was directed againſt the man who, from his devoted attachment to Henry, firſt brought it into uſe. Cromwell, in the next year, was attainted by bill, without trial, examination, or evidence. The duke of Norfolk was, in the latter end of this reign, attainted in the like manner.

NUMEROUS as were the attainders for treaſon, both by bill and by common-law proceedings, theſe did not ſhed ſo much blood as condemnations for hereſy. The kind of execution for this offence is in itſelf ſo horrible, and ſuch ſcenes were ſo often repeated, that it would be irkſome, as well as beſide the purpoſe of this work, to do any thing more than juſt allude to them. The ſtatutes lately made reſpecting religion and the king's ſupremacy, had laid ſo many ſnares both for proteſtants and Romaniſts, that death ſeemed to preſent itſelf on all ſides. The miſerable condition of the people can hardly be better deſcribed than in the obſervation of a foreigner at that time, who remarked, "that thoſe who were againſt the pope were burnt, and "thoſe who were for him were hanged."

[d] Burn. Ref. vol. I. 342.

[e] Ibid. 343, where many are mentioned.

It is more to our purpoſe to obſerve, that among the pains inflicted on the unhappy ſufferers for religion, there are two remarkable inſtances where *torture* was uſed. We are told, that the elegant and good Sir Thomas More was ſo inflamed with religious bigotry, as to ſend for to his own houſe a Mr. Bainham, a gentleman of the Temple, who favoured the new opinions; and becauſe he refuſed to diſcover others who agreed with him in his religious ſentiments, the chancellor ordered him to be whipped in his preſence; he afterwards ſent him to the Tower, and there he himſelf ſaw him put to the torture [f]. Torture.

It is alſo related [g], that the chancellor Wriotheſley, having examined Anne Aſcue with regard to the patrons ſhe had at court, and ſhe refuſing to betray them, he ordered her to be put to the torture, which was executed in a very barbarous manner: he ſtood by while it was performing, and ordered the lieutenant of the Tower to ſtretch the rack farther: but he refuſed, notwithſtanding the chancellor's menaces; who, upon that, put his own hands to the rack, and ſtretched it ſo violently, that he almoſt drew her body aſunder [h].

Long and barbarous impriſonment was among the ſufferings of unhappy delinquents. We are told that the aged prelate biſhop Fiſher, being ſtripped of his biſhopric and every ſpecies of property, was confined in priſon above a twelvemonth, with ſcarcely rags enough to cover his nakedneſs [i].

We ſhall now conſider the legal documents of this reign; the firſt of which are the ſtatutes. The ſtatutes began in this reign to aſſume a different appearance from that which they had before borne, but ſuch as they have continued in ever ſince. This difference conſiſted as well in the language and ſtyle, as in the form of them. We have be- Of the ſtatutes.

[f] Hum. vol. IV. 132.
[g] Fox, vol. II. 578.
[h] Hum. vol. IV. 158.
[i] Ibid. 138.

fore

CHAP. XXX.

HENRY VIII.

fore ſeen, that all the acts of one ſeſſion were ſtrung together as chapters of one ſtatute, with one general title prefixed to the whole; but in the fifth year of this king it firſt became the cuſtom to put a diſtinct title to every particular chapter of the ſtatute [k].

A REMARKABLE circumſtance of the ſtatutes of Henry VIII. is, the prodigious length to which they run. The firſt of theſe long ſtatutes is ſtat. 21 Hen. VIII. c. 5. concerning the probate of wills; and from that period, the legiſlature ſeem invariably to have indulged themſelves in the ſame prolixity. To this they were perhaps tempted by the ſubjects which came under their conſideration, and which required very multifarious proviſions; ſuch as the reformation, the ſucceſſion, the poor laws, the revenue, and other matters. Whatever was the object of parliamentary regulation, was ſtill treated with the ſame abundance of proviſions and profuſion of words. The great motive to this new manner of drawing ſtatutes, ſeems to have been an extreme anxiety, that the meaning of the parliament ſhould be intelligible and clear, beyond all poſſibility of queſtion or cavil. To effect this, an act was ſtuffed with numerous clauſes: and the whole compaſs of language was ranſacked for expreſſions to define and fix the preciſe intention of each.

AN act was generally introduced with a long and emphatical preamble, opening the occaſion and object of it, by enumerating the evils and their propoſed remedies. Theſe preambles, though before in uſe, were now much fuller than formerly. The enacting clauſe was conceived with a view to cover every poſſible caſe; and by a ſeries of expreſſions, of a ſimilar or ſynonymous import, to obviate every pretence to elude it. Leſt this ſhould not completely attain the aim of the parliament, ſeveral proviſos, qualifi-

[k] Hum. vol. IV. 138.

cations,

cations, and exceptions were added, to mark out diſtinctly the direction the act ſhould take.

As this conſiderably encreaſed the length of ſtatutes, it alſo rendered them verboſe, perplexed, and tedious. The ſenſe, involved in repetitions, is purſued with pain, and almoſt eſcapes the reader; while he is retarded, and made giddy by a continual recurrence of the ſame form of words in the ſame endleſs period [l]. This ſolicitude to enſure their meaning has in ſome inſtances carried the parliament ſo far, as to heap one proviſo upon another, and ſometimes to inſert the ſame clauſe twice over [m]. Not content with the aid derived from a multiplicity of words, and from repetitions, to prevent miſconſtructions, the parliament in one ſtatute, upon a ſubject of a delicate nature, added the following remarkable clauſe: "And be it finally enacted, "by the authority aforeſaid, That the preſent act, and "every clauſe, article, and ſentence compriſed in the ſame, "ſhall be taken and accepted *according to the plain words* "*and ſentences therein contained*, and ſhall not be interpreted "nor expounded by colour of any pretence or cauſe, or by "any ſubtle arguments, inventions, or reaſons, to the hin-"drance, diſturbance, or derogation of this act, or any "part thereof; any thing or things, act or acts of parlia-"ment heretofore made, or hereafter to be had, done, or "made, to the contrary thereof, notwithſtanding: and that "every act, ſtatute, law, proviſion, thing and things, here-"tofore had or made, or hereafter to be had, done, or made, "contrary to the effect of this ſtatute, ſhall be void, and "of no value nor force [n]:" a clauſe, which is, at once, an inſtance of the concern and jealouſy felt by the parliament on this ſubject, and an example of that legiſlative language which we have been juſt remarking.

[l] Vid. a ſtrong inſtance of this in ſ. 17 of ſtat. 25 Hen. VIII. c. 21.

[m] Vid. ſect. 8 and 34 of ſtat. 21 Hen. VIII. c. 13. and ſect. 91 and 123 of ſtat. 34 and 35 Hen. VIII. c. 26.

[n] Stat. 28 Hen. VIII. c. 7. ſect. 28.

THAT

CHAP. XXX.

HENRY VIII.

THAT this wordy ſtile is of uſe in ſubjects which require legal preciſion, is evinced, from its being adopted much about the ſame time in deeds of conveyance; where we find the like tedioufneſs of phraſeology, and a ſimilar multiplicity of covenants and proviſos. The ſame peculiarity of language has continued ever ſince in both.

WITH all this preciſion in wording the contents of an act, they ſeemed to pay no attention to the title, but to abandon that to chance or ignorance to prefix; the title ſeldom conveying any idea of the deſign or contents of the ſtatute, and often being groſsly incorrect.

Of the Year-book.

THE Reports of this reign are contained in the *Year-Books*, and in *Dyer*; with ſome ſcattered caſes in *Keilway*, *Jenkins*, *Moore*, and *Benloe*; and towards the end of the reign in *Leonard*. The Year-Book is a very ſcanty one, compared with thoſe which went before; owing, probably, to perſons being no longer encouraged with a ſtated appointment to execute this taſk. It contains only the 12th, 13th, 14th, 18th, 19th, 26th, and 27th years; and there ends this famous collection of Reports called the Year-books.

PERHAPS, ſince a taſte for all kinds of learning had begun to prevail, the opinion of this eſtabliſhment of reporters was altered, and it was though more adviſeable to truſt to the general inclination diſcovered in private perſons to take notes; who, probably, from a competition, would do more towards rendering this department perfect and uſeful, than any temptation from a fixed ſalary: whatever might be the reaſon, ſuch a ſtipend was no longer continued, and the undertaking dropped.

HOWEVER, we find no want of reporters. Theſe began now to multiply; and very ſoon, if not in this reign, furniſhed, all together, a greater variety of caſes than uſed to be taken on the former plan. As there would thenceforward have been no reports, if gentlemen in the profeſſion had not made them, either for their own uſe or with deſign

ſign to publiſh, a certain diligence and attention began to be paid to this new exerciſe of ability: and the buſineſs of reporting opened a new field to the ſtudious for the diſplay of accuracy, judgment, and learning. From this period, there will be ſeen to follow a train of writers of this kind, of various characters and merit, to whom we are obliged for carrying on the written annals of the law down to the preſent time. There is one thing common to all thoſe of this period, that they followed the language in which their predeceſſors had written, and publiſhed their reports in the Law-French.

THE law received great improvement from the many treatiſes and uſeful collections publiſhed in this reign. Theſe, by digeſting the learning of the law, at once gave a poliſh to the rude materials furniſhed by former ages, and rendered the knowledge of them more eaſily attainable. The publications of this reign may be divided into ſuch as were produced by writers of this period, and ſuch as were written in former reigns, and were now for the firſt time put to the preſs. We ſhall purſue theſe two claſſes of publications according to the courſe of time, that the progreſs made in improving the ſtock of legal learning may be diſtinctly perceived. Every addition in theſe times to the lawyer's library is an object of curioſity.

THE moſt diſtinguiſhed writer upon law in this reign, is *Anthony Fitzherbert*, firſt a ſerjeant, and ſome years after a judge of the common-pleas. The firſt book publiſhed by this learned author was his *Grand Abridgement*, printed in 1514 by Richard Pynſon *. So uſeful a work ſoon required another ſupply. In 1516 a ſecond edition was printed by Wynkyn de Worde, or perhaps this is one of the books that were printed for him abroad, where the Law- Fitzherbert.

* It is collected from John Raſtell's preface to the *Liber Aſſiſarum et Placitorum Coronæ*, that he had ſome hand in the publication of this Abridgement. It was printed in three volumes, in folio; and the price of it, and of the next edition in 1516, was forty ſhillings.

French

CHAP. XXX.

HENRY VIII.

French was better underſtood, and where, for that reaſon, many of our law-books uſed to be printed [p]. In 1534 he publiſhed his new *Natura Brevium*, which was reprinted in 1537 [q]. Several books were printed in this reign on the office and duty of a juſtice of peace. The firſt was in 1515, in which year we find two works printed by different printers under the title of *The Boke of Juſtices of Peas* [r]. In 1534 there appeared another work, entitled, "*The Boke for "a Juſtyce of Peace never ſo well and diligently ſet forth.*" All theſe were without any name. Afterwards, in 1541, we find "*The New Booke of Juſtyces of Peace, made by An-"thony Fitzherbert, Judge, lately tranſlated out of Frenche "into Engliſhe*" [s]. Theſe are all the writings that are known to belong to Fitzherbert upon the law of England: ſeveral anonymous tracts, which will be mentioned in their proper places, have been attributed to him, though upon no ſufficient authority.

Saint Germain.

SAINT GERMAIN is an author who gained conſiderable note in this reign, by his famous book intitled, "*Doctor "and Student.*" The firſt dialogue of this work came out in 1518, in Latin, with the following title, *Dialogus de Fundamentis Legum Angliæ et de Conſcientiâ.* The ſecond dialogue was printed in Engliſh in 1530; and the next year there appeared a tranſlation of the firſt dialogue. Both afterwards paſſed ſeveral editions, under the title of *Doctor and Student* [t]. This author's writings upon the comparative rights of the eccleſiaſtical and temporal powers will be mentioned in another place.

OF the foregoing performances, the *Abridgement* and *Natura Brevium* of Fitzherbert, and the *Doctor and Student*, are the moſt diſtinguiſhed. The *Abridgement* is a work of ſingular learning and utility. If the date of Statham's

[p] Typog. Antiq. 260. 154.
[q] Ibid. 423. 429.
[r] Ibid. 152. 346.
[s] Typog. Antiq. 554.
[t] Ibid. 333. 379.

pub-

publication could be aſcertained to be antecedent to this, many reflections might be founded on the comparative excellence of the preſent work: it might then be ſaid to be formed on that of Statham; that Statham's was the common-place book of the time, and as ſuch furniſhed a baſis, on which the ſuperſtructure of Fitzherbert's more enlarged and improved work was raiſed; that the experience of a few years pointed out the defects of the former, and enabled Fitzherbert to make the neceſſary corrections. The foundation for theſe obſervations being very uncertain, we can only remark, that the latter work is five times the ſize of the former; that it contains the caſes as low down as the time of its publication; that theſe are abſtracted more fully, and convey the ſenſe of the book more ſatisfactorily: otherwiſe, the order of Statham's work in the titles ſeems to be followed, and the caſes ſeem to be arranged with the ſame diſregard to method and connexion. This Abridgement was a valuable acquiſition to the lawyers of this period, but was ſuperſeded by the abridgement of Sir Robert Brooke in after-times: the latter abridger had the advantage of his predeceſſor, in poſſeſſing many year-books which he had never ſeen. The original caſes, on the other hand, of the reigns of Richard II. Edward II. Edward I. and Henry III. which are to be found only in Fitzherbert, preſerve to this work a reputation entirely its own. Several in other reigns, and particularly about his own time, are not taken from any book we have; ſo that Fitzherbert's, tho' in general an abridgement, is alſo in many parts an original work.

FITZHERBERT'S *Natura Brevium*, like his other performance, is an improvement of a more antient work of the ſame nature and title. It is remarkable, that this treatiſe on the nature and effect of the principal writs in the Regiſter, was publiſhed at a time when thoſe writs were, many of them, going into diſuſe, and ſoon afterwards became obſolete; ſo that hardly nine parts in ten of this work make a portion of our preſent law.

CHAP. XXX.

HENRY VIII.

THE form and ſtile of theſe two works have all the dryneſs of profeſſional treatiſes. The *Doctor and Student* is a production of a different caſt: it conſiſts of two dialogues between a doctor of divinity and a ſtudent of the common law. Theſe contain diſcuſſions on the grounds of our law; and where objections had been ſtated to ſome of its rules and maxims, it is endeavoured to reconcile them with reaſon and good conſcience. The whole is treated in a popular way, with the freedom and language of converſation, conveying, by means of objections, and their anſwers, not an unſatisfactory account of many principles and points of the common law.

Raſtell.

AMONG the law-writers of this reign are to be reckoned *John Raſtell*, the printer and lawyer, and his ſon *William Raſtell*, the lawyer and printer: the former was bred a printer, and though he did not take to the practice of the law, yet it evidently appears from his works, that he had been a diligent ſtudent; the latter, though educated for the bar, and a practicer, ſucceeded to his father's occupation, which he ſeems to have united with his profeſſion, till the honours of the latter at length called upon him to decline it altogether. John Raſtell tranſlated from the French the Abridgement of the Statutes prior to the time of Henry VII. mentioned before [x]. He alſo abridged thoſe of Henry VII. and down to the 23d and 24th of this reign, which were printed together by the ſon William in 1533. This was the firſt Abridgement in the Engliſh language; and it is introduced by the author with a long preface recommending the printing of law-books in Engliſh; and aſcribing great praiſe to Henry VII. for firſt directing the ſtatutes to be made in the mother-tongue. To this writer are aſcribed two other books, *Les Termes de la Ley*, and *The Tables to Fitzherbert's Abridgement.*

[x] Vid. ant. 120.

The

The title of authorſhip has, however, been diſputed with reſpect to theſe two works, which have by ſome been given to the ſon William. As to *Les Termes de la Ley*, it was aſcribed to John by Bale; but it is omitted by *Pitts* in his account of him, and peremptorily denied to be his by Wood, who as poſitively attributes it to William: That was Lord Coke's opinion; but biſhop Tanner again reſtores it to John. Perhaps it may be giving to each his diſtinct merit, if we ſuppoſe that John compoſed the original work in French, and that William made the tranſlation, which was printed by him, and was never doubted to be his [y].

THE tables to Fitzherbert's Abridgement were firſt printed in 1517; the tranſlation of the Abridgement of the Statutes in 1519, and again in 1527; *Les Termes de la Ley*[z], in 1527 [a].

To William Raſtell is aſcribed a tract called *The Chartulary*, printed in 1534; but there ſeems no pretence for this ſuppoſition, and the work is no more than the tract which had before been printed under the title of *Carta Fœdi ſimplicis*. How far he was author of the *Termes de la Ley*, has juſt been conſidered. He made a table to Fitzherbert's *New Natura Brevium*, and another of the pleas of the crown. The tables to Fitzherbert's Abridgement, which are aſcribed by ſome to him, are the ſame probably that were before made by his father, and were reprinted

[y] According to Wood, William was but nineteen years old, and only two years ſtanding in the univerſity, when this book was firſt printed. It is remarkable, that in the reprint of the poem prefixed to the tranſlation, William introduces a ſentence, that was not in the firſt edition, expreſſing that he firſt wrote that book in French, and then tranſlated it into Engliſh. If the above date is correct, the aſſertion of William may perhaps be ſuſpected. Typ. Antiq. 331.

[z] This was the title given to the work by William; but when firſt publiſhed by John, it bore the following title; *Expoſitiones Terminorum Legum Anglorum et Naturæ Brevium, cum diverſis Caſibus, Regulis, et Fundamentis Legum tam de Libris Magiſtri Littletoni quam de aliis Legum Libris collectis, et breviter compilatis pro Juvenibus valde neceſſariis*; but, though the title was in Latin, the work was in French. Typ. Antiq. 331. 474.

[a] Typ. Antiq. 326, &c.

CHAP. XXX.

HENRY VIII.

by William. The performances, therefore, which moſt diſtinguiſh William Raſtell, belong to a later period than this reign: theſe are his *Collection of Engliſh Statutes*, printed in 1559: and his *Entries*, printed long after his death, in 1596[b].

As valuable a performance as any, perhaps, of this reign, is Perkyns's *profitable boke* on the learning of conveyancing. This was firſt printed in 1532, with the following title: *Incipit perutilis Tractatus Magiſtri Jo. Parkins interioris Templi Socii, &c.* This book is in French[c].

Besides the writings of the above authors, ſeveral books made their appearance in this reign without a name, or any intimation to what name they belonged; though ſome of them have been aſcribed to certain of the writers already mentioned. The earlieſt of theſe anonymous publications is the *Intrationum Liber*, which was printed by Pynſon in 1510[d]. In 1516 were publiſhed by the ſame printer, the book called *Modus tenendi Curiam Baronis cum Viſu Franciplegii*, the *Retorna Brevium*, the *Modus tenendi unum Hundredum, ſive Curiam de Recordo*[e]: in 1525, *the Diverſite de Courtz et lour Juriſdictiones et alia neceſſaria et utilia*, attributed by ſome to Fitzherbert; and the *Articuli ad Narrationes Novas partim formati*. In the year 1527 was printed the book uſually called *Carta Fœdi*: the title of it was, *Parvus Libellus continens Forman multarum Rerum*; and then, *Carta Fœdi ſimplicis cum Literâ attornatoriâ* is the head title of the firſt article in the book, and ſo gave it afterwards that name. This is a book of precedents of feoffments, releaſes, and other conveyances, and was frequently reprinted in this reign, ſometimes under the title of *The*

[b] Typ. Antiq. 473, 474.

[c] Lord Coke has been very incorrect in aſſigning the date of ſeveral of the early printed works on our law; but he is unuſually ſo, when, ſpeaking of this, he ſays, "Perkins, "a little treatiſe of certain titles of "the common laws, wittily and "learnedly compoſed and publiſhed "in the reign of king Edward the "Sixth." Pref. to 10 Rep. Typ. Antiq. 390.

[d] Typ. Antiq. 255.

[e] Ibid. 260.

Char-

Chartulary, and by ſome is attributed to William Raſtell [f]. In 1540, there came out a book intitled, *The principal Laws and Cuſtoms and Statutes of England which be at this preſent day in uſe* [g]. In 1543, there appeared a book upon the office of ſheriffs, bailiffs of liberties, eſcheators, conſtables, and coroners [h]. At the cloſe of this reign, in 1546, there appeared *A Booke of Preſidentes, exactly written in maner of a Regiſter, and ſhewing how to make al maner of Evydences and Inſtrumentes.*" And of the ſame date [i], another intitled, *Inſtitutions or principal Grounds of the Laws and Statutes of England* [k]: and another, in 1547, under the title of *The Attorney's Accademy* [l].

Most of the foregoing works were repeatedly printed by different printers in the courſe of this reign, and many of them were tranſlated into Engliſh. Some of them were collected and publiſhed together. We find, in 1534, the following pieces were publiſhed by Raſtell, in one quarto volume: *Natura Brevium*, the Olde Tenures, Littleton's Tenures, the New Talys, the Articles upon the New Talys, Diverſitie of Courtes, Juſtice of Peace, the Chartulary, Court Baron, Court of Hundrede, *Retorna Brevium*, the Ordynaunce for takynge of Fees in the Exchequer. In his preface to this publication, addreſſed to the ſtudents of the law, he ſays, that perſons begun to ſtudy the law with reading *Natura Brevium*, the Old Tenures, and Littleton's Tenures [m].

In the year 1544 another collection was printed by Berthelet, containing, the boke for a Juſtice of Peace, the boke that teacheth to keepe a Court Baron or a Lete, the boke teaching to keep a Court Hundred, the boke called *Retorna Brevium*, the boke called *Carta Fœdi*, and the

[f] Typ. Antiq. 387, 388. 447. 481.
[g] Ibid. 408.
[h] Ibid. 555.
[i] Ibid 521.
[k] Ibid. 708.
[l] Ibid. 874.

[m] His words are, "Lyke as a "chylde goynge to ſcole, fyrſte "lerneth his letters out of the abc, "ſo they that entende the ſtudy of "the law do fyrſte ſtudy theſe" Typ. Antiq. 481.

boke

CHAP. XXX.

HENRY VIII.

boke of the Ordinaunce to be obſerved by the officers of the King's Eſchecker for fees-taking. This ordinance for regulating fees in the exchequer was made in the time of Henry VI [n] To theſe productions of this reign may be added two pieces that have lately been brought to light: one intitled, "A Replication of a Serjaunte at the Lawes "of England to certayne Pointes alleaged by a Student of "the ſaid Lawes of England, in a Dialogue in Engliſhe "between a Doctor of Divinity and the ſaid Student;" the other, "A litle Treatiſe concerning Writs of Sub-"pœna." The latter is thought to be written by St. Germyn, in vindication of the paſſages in the Doctor and Student that had been attacked by the ſuppoſed Serjeant in the former tract [o].

SOME publications of this period, on the controverſies about religion, may, from the incidental diſcuſſion of certain points of eccleſiaſtical juriſprudence, be reckoned in the claſs of law-books. Such was "A Treatiſe concerning "the Diviſion between the Spiritualty and Temporalty;" which was alſo printed under the title of "The Pacefier "of the Diviſion between the Temporalty and Spiritualty." This is attributed to St. Germyn; and the principal part of Sir Thomas More's Apology is levelled at this work. To this St. Germyn replied, in another tract intitled, "*Salem* "*and Bizance*; a Dialogue between two Engliſhe Men, "whereof one was called Salem, and the other Bizance," which occaſioned Sir Thomas More's "Debellacyon of "Salem and Bizance." The two laſt works were printed in 1533 [p]. To theſe may be added other treatiſes, the authors of which are not known: "A Treatiſe concerning "divers of the Conſtitutions provincial and legatine:" "A Treatiſe concerning the power of the Clergy and the "Laws of the Realm;" both printed by Godfrey. "The

[n] Typ. Antiq. 447, 448.

[o] Theſe two pieces are now printed for the firſt time in Mr. Hargrave's firſt volume of Law Tracts.

[p] Typ. Ant. vol. I. 402, 421, 478.

"true

"true Difference between the Regal Power and the Eccle-
"ſiaſtical Power[q]." "The Liberties of the Clergy col-
"lected out of the Laws of the Realm, by John Goodall."
"A Dialogue between a Knight and a Clerk on Power ſpi-
"ritual and temporal[r]." We find alſo a tranſlation of the Conſtitutions provincial and legatine, printed in 1534.

Printing of law-books.

NEXT to the performances of writers, thoſe of printers are to be reckoned among the helps to the ſtudy of the law. At the opening of this reign, Pynſon was continued in the appointment of king's printer, and he was ſucceeded by Thomas Berthelet, in 1529. Berthelet was the firſt who had this office granted to him by patent: the grant was for life, and he kept it during the whole of this reign[s]. The printing of law-books lay principally with theſe printers, with John and William Raſtell, and with Robert Redman; all of whom printed the ſtatutes, and various law-treatiſes, over and over again.

IT is unneceſſary to enumerate the ſeveral collections of the ſtatutes at large that were printed in this reign[t]; it is ſufficient to obſerve of them in general, that they uſually bore the title of *Magna Charta*, or *Liber Magnæ Chartæ*, and they commonly contained all the acts down to the time of their publication. But ſome of thoſe editions deſerve more particularly to be remembered. In 1531, Berthelet printed ſome ſtatutes with the common title of *Magna Charta, cum aliis Statutis*. Some few months after, in 1532, he printed another collection with the title of *Secunda Pars Veterum Statutorum*. On the back of the leaf he informs the reader, that the following ſtatutes were known to few, and were now printed for the firſt time,

[q] This book has been attributed by ſome to Henry VIII.; by others to biſhop Fox. Typ. Antiq. vol. I. 354.

[r] Typ. Antiq. vol. I. 324. 384. 402. 437.

[s] Ibid. 241, 417.

[t] The following are different editions of the ſtatutes at large; by Pynſon, in 1519, 1526, and 1527; by Wynkyn de Worde, in 1528; by Redman, in 1525, and 1539. Typ. Antiq. 177. 265. 275. 279. 386. 396.

having

CHAP. XXX.

HENRY VIII.

having been moſt of them examined with the parliament-rolls; and becauſe ſome other ſtatutes, printed with *Magna Charta*, were intitled *Vetera Statuta*, he thought the preſent might very properly be called by the title he had given them [u]. Theſe titles ſeemed to pleaſe the editor; for in 1540, we find theſe two books again printed by Berthelet [x]. In 1543, the ſame printer publiſhed, in one volume, all the ſtatutes from Hen. III. to the firſt of Hen. VIII. [y]. Before that, in 1534, there was printed by Redman an edition of the ſtatutes in England, tranſlated by *George Ferrer*, which was reprinted in 1542 [z].

NEXT to the ſtatutes at large, the abridgement of them preſents itſelf. The Abridgement, mentioned in the former reign, ſeems to have been frequently reprinted. *Le Bregement de toutz les Eſtatuts* was printed by Pynſon in 1521; and again, with additions by Wm. Owein of the Middle Temple, in 1528 [a]. In 1527, an abridgement of the ſtatutes was printed in Engliſh, by John Raſtell [b]; and in 1533, with conſiderable additions, by Wm. Raſtell, under the title of *The grete Abregement of the Statutys of Englond, untyll the 22d year of Henry* VIII. [c]; "which was reprinted with the ſame title by Petit, and alſo by Myddylton, in 1542, containing the abridgement of ſtatutes down to 33 Hen. VIII [d].

THUS far of collections of the ſtatutes at large, and of abridgements of them. We find ſome ſpecimens of thoſe partial publications that have become of late days very common from the uſe they are of in practice. In 1538 was printed, *A booke, containing the ſtatutes which the king had enjoined to be put in execution by juſtices of peace, ſheriffs, bailiffs, conſtables, and other miniſters of juſtice* [e]. It ſhould be added to this account of the ſtatutes, that they

[u] Typ. Antiq. 419.
[x] Ibid. 436.
[y] Ibid. 443.
[z] Ibid. 394, 554.
[a] Ibid. 267, 268, 281.
[b] Typ. Antiq. 330.
[c] Ibid. 429.
[d] Ibid. 554. 573.
[e] Ibid. 432.

were

were alſo printed regularly after every ſeſſion of parliament.

The printing of the year-books was carried on with great earneſtneſs during this reign; but, as has been before obſerved, owing to their being generally printed without a date, the time of their appearance, for the moſt part, cannot be aſcertained [e]. We know that they were moſtly printed by Pynſon, by Berthelet, and by Redman. The earlieſt that has been found with a date, was printed in 1517, by Pynſon [f]. They were uſually printed ſingle; but thoſe from 22d to 28th of Ed. III. incluſive, were printed in one publication, in 1532. The famous *Annus Quadrageſimus* was not printed till 1534 [g]. Many remained unprinted at the cloſe of this reign. Several antient law-books were printed and reprinted. In 1522, we find the *Natura Brevium*, ſince called the *Old Natura Brevium*: in 1525, *The Olde Teners, newly corrected* [h]. In 1531 was printed, by William Raſtell, *The Regyſter of the Wryttes orygynal and judycyall* [i]. Britton was printed by Redman, but without a date; as was *Statham's Abridgement* by, or rather for, Pynſon, who employed Tailleur, a printer of Roan in Normandy, to print Littleton, and many other books, amongſt which this was moſt probably one, as it bears Tailleur's mark [k]. The *Novæ Narrationes* were printed, but without a date.

Most of theſe books were reprinted by all the printers during this reign; law-books and ſchool-books being thoſe articles which the early printers were more frequently called upon to multiply than any other. But none paſſed thro' the preſs ſo often as Littleton's Tenures; the print-

[e] However thoſe verſed in Typographical Antiquities have fixed the date of ſome. The 46th Ed. III. in 1517; the 7th and 48th Ed. III. in 1518; the 50th Ed. III. in 1519; the 47th Ed. III. in 1520. Theſe were printed by Pynſon, as was the *Liber Aſſiſarum*, without a date. Typ. Antiq. 264, 265, 300.

[f] Typ. Antiq. 302. 400.

[g] Ibid. 420. 394.

[h] Ibid. 274.

[i] Ibid. 475.

[k] Ibid. 241. 284. 399.

ing

CHAP. XXX.

HENRY VIII.

ing of which ſeems to have raiſed a violent competition between two famous printers of theſe days [l].

THERE was not leſs concern in this reign than in the former, about the eccleſiaſtical part of our law. *Lyndwoode's Provinciale* underwent repeated impreſſions. In 1529, The Legatine Conſtitutions of Otho and Ottoboni were printed by Wynkyn de Worde [m]. We find alſo a book without a date, intitled, *Tractatus Juris Canonici* [n].

The Regiſter.

WE cannot diſmiſs this catalogue of new-printed books, without making a few remarks upon the moſt diſtinguiſhed of them, The Regiſter of Writs. The Regiſter of Writs is ſaid to be the oldeſt book in the law; a character which may, in a great meaſure, be true, but ſhould not be allowed without ſome conſideration. It is not more certain than extraordinary, that the forms of writs were very early ſettled, in their ſubſtance and language, nearly in the manner in which they were drawn ever after. However, this uniformity was not ſo exact, as that the writs publiſhed and uſed in the reign of Henry VIII. were all of them identically the ſame with thoſe uſed at the firſt origin of this invention, in the reign of Henry II. It is not to be wondered that there ſhould be a difference in theſe

[l] In an edition of Littleotn, printed by Pynſon, in 1525, there is the following addreſs to the reader, containing a bitter invective againſt Redman. *En tibi, candide lector, jam caſtigatior (ni fallor) Littletonus occurrit. Curavi ut e calcographiâ meâ non ſolum emendatior, verum etiam elegantioribus typis ornatior prodeat in lucem, quam elapſus eſt e manibus Roberti Redman, ſed verius* RUDEMAN, *quia inter mille homines* RUDIOREM *haûd facile invenies. Miror profectò unde nunc tandem ſe fateatur Typographum, niſi forte quum diabolus ſutorem nauclerum, et illum calcographum fecit. Olim nebulo ille profitebatur ſe bibliopolam tam peritum quam unquam ab Utopia exiluit; Bene fuit, liber eſt, qui præ ſe ſpeciem libri fert, præterea fere nihil; tamen auſus eſt ſcurra polliceri ſuâ curâ reverendas ac ſanctas leges Angliæ ſcite vereq; omnes imprimere. Utrum verba dare uſus, an vtrax ſit, tu Littletono legendo, ſciliçet ſuâ curâ ac diligentia excuſo, illico videas. Vale.* Pynſon attacked him in another edition of Littleton, and in one of Magna Charta.

Pynſon was at this time jealous of Redman's riſing merit and pretenſions as a law-printer. But this ſome years after ſubſided, and a reconciliation probably took place, for Redman became ſucceſſor to Pynſon in his houſe and trade. Typ. Antiq. 274. 385.

[m] Typ. Antiq. 180. 287.

[n] Ibid. 287.

forms

forms at their infancy, and at this advanced ſtate of our law; but it is extremely remarkable that the difference ſhould be ſo ſmall.

As the writs in the printed Regiſter muſt be taken to be ſuch as they were uſed at the time of its publication, it will be curious and amuſing to compare them with thoſe in ſeveral antecedent periods of our law; with thoſe in Glanville and Bracton; thoſe in the reign of Edward I.; and thoſe in the Old *Natura Brevium*, in the reign of Edward III. This we ſhall attempt, by ſelecting ſome of the principal original writs.

To begin with Glanville. We find the writs of novel diſſeiſin and of mortauncеſtor, as given by that author [o], correſpond exactly with thoſe in the Regiſter, in the ſcope, ſubſtance and words; with the difference only of the *teſte* in the name of the grand juſticiar, as all writs were then; of the king's ſtile, which was then always in the ſingular number; and of a return conſiſtent with the order of judicature in thoſe times. On the other hand, the writ of right of advowſon [p], tho' it agrees in the main of it with that in the Regiſter, is not *verbatim* the ſame. The *aſſiſa ultimæ præſentationis* [q], differs only in a few words. The writ of debt [r] is *verbatim* the ſame, except that inſtead of alledging the *detinet*, it ſays, *injuſtè deforceat*. Theſe are a few out of the many obſervations that might be made, on a compariſon of the writs in Glanville with thoſe in the Regiſter.

The writs in Bracton, as to their compellation, *teſte*, and direction, are nearer the preſent form than thoſe in Glanville. As to the ſubſtance of them, it appears, that the writ *de dote unde nihil habet* [s], *aſſiſa mortis anteceſſoris* [t], and *quare impedit* [u], agree with the Regiſter *ver-*

[o] Vid. ant. vol. I. 178. 189.
[p] Ibid. 137.
[q] Ibid. 185.
[r] Ibid. 158.
[s] Lib. 4. Tr. b. c. 1. 2. Vid. ant. vol. I. 378.
[t] Lib. 4. Tr. 3. c. 2. Vid. ant. vol. I. 358.
[u] Vid. ant. vol. I. 355.

batim.

CHAP. XXX.

HENRY VIII.

batim. The writ of *aſſiſa ultimæ præſentationis* [x] agrees in ſubſtance, but not *verbatim*: and the writ of *intruſion* differs entirely [y] from the Regiſter.

In the time of Edward I. the ſubject of writs was ſtudied with more nicety; therefore, after the near correſpondence we have ſeen between the precedents of the time of Henry III. and thoſe in the Regiſter, we muſt not wonder to find it then ſtill more. In the *Statutum Walliæ*, among the regulations made for the judicial polity of that principality, there are forms of writs preſcribed, which, no doubt, were copied from thoſe uſed in our courts; and theſe, with the ſingle difference of the returns, and the ſtile of the juſtices peculiar to the courts there, are *verbatim* the ſame with thoſe in the Regiſter: theſe are, the writ of dower, aſſiſe of mortaunceſtor, of novel diſſeiſin, of common of paſture, of debt, of covenant, of appointing an attorney, and *de coronatore eligendo* [z].

The reigns of the three Edwards conſtituted a period when the learning of writs was cultivated with great attention. Accordingly we find, that the forms of them were ſo completely ſettled during that time, that the writs in the Old *Natura Brevium*, a collection made in the laſt of thoſe three reigns, agree *exactly* with thoſe of the Regiſter; only the writ of intruſion [a], which differed ſo widely in Bracton's time, was not yet reduced to the form of the Regiſter. In the time of Henry VIII. the writ of treſpaſs and aſſault, the earlieſt precedent of which (except ſome records in Riley's *Placita*, in Edward I's reign) is in the Old *Natura Brevium*, has a very trifling difference from that in the Regiſter. The writ in the former does not contain the following words of aggravation, *ita ut de vitâ ejus deſperabatur*, which are in the latter.

[x] Lib. 4. Tr. 2. c. 1, 2. Vid. ant. vol. I. 349. 351.

[y] Lib. 4. Tr. 1. c. 2. Vid. ant. vol. I. 320. 396.

[z] Vid. ant. vol. II. 97, 98.

[a] Vid. ant. vol. III. 39.

THESE

THESE differences, though many of them may appear in themſelves quite immaterial, yet ſerve in ſome meaſure to date the antiquity of the writs collected in this volume. It may be inferred from this comparative view, that the ſubſtance of original writs, in their conception, drift, and language, is very ancient; that the alterations they have undergone have been very few, and thoſe only in a ſmall turn of phraſe, the change of a word, or at moſt the addition of ſome ſmall circumſtances; that thoſe changes were made in general very early; that the forms were, moſt of them, ſettled *verbatim* at leaſt by the time of Edward III.; and in that ſtate were afterwards printed in the Regiſter in the reign of Henry VIII.

THIS obſervation as to the antiquity of writs, is only meant to apply to thoſe common-law remedies which we have been juſt recounting, and the like; for many of the writs in the Regiſter are evidently of later origin than the time of Edward III. being ſome of them framed upon ſtatutes paſſed ſince, and others contrived in conſequence of alterations in practice, or for other cauſes.

HAVING ſaid thus much concerning the probable antiquity of the Regiſter, we ſhould next conſider the contents of this volume; of which it will be ſufficient to ſay, that it contains writs, original and judicial, adapted to the purpoſe of redreſs in every poſſible caſe of injury to the perſon or property; to provide for every incident which may ariſe in the courſe of a judicial proceeding; and, finally, to give the full effect to ſuch proceeding by execution.

IT was by degrees that writs increaſed to the multitude and variety which is exhibited in this volume. A ſufficient foundation ſeems to have been laid for this ſuperſtructure even in Glanville's time. From the numerous writs, and the application of them, in Glanville's work, we can perceive, that at every turn and ſtop in proceeding, whenever there was a *dignus vindice nodus*, a writ was ready framed to remove the cauſe of delay, and expedite the progreſs of the

CHAP. XXX.

HENRY VIII.

the ſuit; ſo that there were, in his time, writs contrived ſuitable to very many occaſions. In the time of Bracton we find them greatly increaſed; and yet, perhaps, this increaſe was not ſo much in the new kinds of writs, though that too was conſiderable, as in the variety of forms to ſuit ſimilar caſes of the ſame kind. Thus, for inſtance, where we find in Glanville only one precedent of an original writ, or at moſt two; in Bracton, there are ſometimes ſeven or eight different forms, fitted to the ſpecial circumſtances of particular caſes.

In the times of Glanville and Bracton, writs were *formata*; that is, every particular variation was *formed*, as we are told, by expreſs authority of parliament, and the clerks in chancery could not alter an iota of that which had been ſanctioned by the legiſlature. If the increaſe of writs was ſo rapid under the great difficulty of applying to parliament in every new cauſe, it is not to be wondered, that after the ſtatute of Weſtminſter 2. had allowed the clerks to make writs *in conſimili caſu*, the number and variety of them ſhould multiply to the degree they did; and that where there were ſeven or eight different precedents of one kind in Bracton, there ſhould be ten or more in the Regiſter in the preſent reign. The conſtruction of *ſimilar caſes* left ſuch a latitude, when applied to every writ at that time exiſting and in practice in the chancery, that the maſters, who were appointed for this ſpecial purpoſe, deviſed new writs with great readineſs, on moſt occaſions, where they were warranted by any colour of former precedent; ſo that, in conſequence of this ſtatute, the buſineſs of making new writs became intirely a matter of legal diſcretion.

When things had taken this courſe, writs came under a very different conſideration from that in which they ſtood formerly. In early times, when they were in a ſtated form, and that form was in general known only to thoſe in the chancellor's office, the courts uſed to conſider themſelves

ſelves as bound to abide by them, whatever they were; looking upon them as precepts iſſuing out of an office where themſelves had no controul or direction, and taking for granted that they were in the uſual courſe: but after this ſtatute, writs were no longer a point of official knowledge. The maſters, whoſe particular buſineſs was the making of writs, were choſen for their learning in the law; and as they could frame them only on principles of legal analogy, the courts took upon them to judge of the legality of them, as a matter to which they were equally competent with the maſters. Hence it was that writs became a new learning among the profeſſors of the law: and we find in the reign of Henry VI. no leſs than ten inns of chancery eſtabliſhed for this particular ſtudy; which was conſidered as containing the firſt principles of the law, and that in which young men could employ their noviciate with the greateſt advantage.

THIS, in time, had very material conſequences. The knowledge of writs was ſo far from being peculiar to the maſters, that they were not even the moſt knowing in their own art. This knowledge was in the hands of every body; and he who had moſt knowledge of the law, was the beſt able to word a writ. It then happened, that the maſters, as they grew to be of leſs conſideration for this particular ſkill, in time neglected the ſtudy entirely; and the practicers were under the neceſſity, for the ſafety of their cauſe, to get lawyers of eminence to ſettle the form of a writ. This they preſented at the office to be put to the ſeal, under the inſpection of a maſter; till at length even that formality ceaſed; and in this reign it had become the practice to paſs them only thro' the curſitors' office, without any interference of a maſter, and ſo preſent them for ſealing. Thus, by a ſingular revolution, did the making of writs become again a matter, as it were, *de curſu*; in which the chancery took no further concern that what related to the ceremony of the ſeal.

THE

CHAP. XXX.

HENRY VIII.

THE maſters in chancery in this reign were men quite of another profeſſion: they were moſt of them civilians and eccleſiaſtics; and it had been a rule with the chancellor to preſent them to churches not exceeding twenty marks in value [b].

WHEN things were in this ſtate, the Regiſter was printed; by which this kind of learning ſeemed to be made more declaredly *publici juris* than ever. Whether it is to be attributed at all to the publication of this book, which might have taken off any peculiar ſanctity heretofore aſcribed to its forms; or to the inattention and want of ſkill in the then ſet of maſters; or to the unaccountable change of opinions in matters of law, as well as in every thing elſe: whatever was the cauſe, it ſo happened, that ſoon after the preſent period, this repoſitory of chancery-learning began to be looked upon with leſs reverence than formerly. In the reign of queen Mary, it was ſaid by a judge on the bench, that a writ was not exceptionable becauſe not to be found in the Regiſter: the truth of the caſe was now to be the guide in drawing a writ, and not the preciſe form that was exhibited in the Regiſter [c].

INDEED the knowledge of writs had long been ſo general, that probably the ſame opinion was held reſpecting this collection at the time it was publiſhed. However that may be, it was certainly at that time a valuable addition to the law-library. For though it was not then conſidered as furniſhing a collection of forms and rules concluſive and incontrovertible; yet it muſt be received as a ſet of precedents of the higheſt authority, and approaching nearer to abſolute perfection than any thing then in print. With regard to poſterity, it ſtands in a different light. The revolution which had begun to take place in the methods of redreſs, and which was now becoming every day more general, rendered great part of this famous volume obſolete before the world was put in poſſeſſion of it; and the current

[b] Hiſt. Chanc. 36. [c] Plowd. 229.

has

has ever ſince ſet ſo ſtrong the ſame way, that, at this time, the Regiſter is reduced to a piece of juridical antiquity; and is oftener recurred to as a matter of hiſtorical curioſity than of practical uſe. The ſelection made by Fitzherbert is abundantly more than ſufficient for the few enquiries now made into the nature of writs.

Miſcellaneous facts.

It appears from a manuſcript of this reign, relating to the government and diſcipline of the Middle Temple, that the members of that ſociety were divided into two companies, called *Clerks Commons*, and *Maſters Commons*. The firſt conſiſted of young men during their firſt two years ſtanding, or thereabouts, till they were called up to the Maſters Commons. The Maſters Commons was divided into three companies, that is, *No Utter Barriſters*, *Utter Barriſters*, and *Benchers*. The firſt of theſe were ſuch as from their ſtanding, or neglect of ſtudy, were not called upon by the Elders or Benchers to diſpute and argue ſome point of law before the Benchers: thoſe diſputes were called *Mootings*. *Utter Barriſters* were ſuch as were five or ſix years ſtanding, and were called upon to argue at the Mootings; ſo that making an Utter Barriſter, was conferring a ſort of degree for the party's progreſs in learning. *Benchers* were ſuch Utter Barriſters as had been in the houſe fourteen or fifteen years; they were choſen by the Elders of the houſe to *read*, expound, and declare ſome ſtatute openly to all the ſociety. During the time of his reading, this perſon was called a *Reader*, and afterwards a *Bencher*.

There were, as they expreſſed it, two principal times of their *Learning*: theſe were called *Grand Vacations*. One begun the firſt Monday in Lent; the other, the firſt Monday after Lammas; each continued three weeks and three days. It was at theſe ſeaſons that the readings were; in the former, by the Benchers themſelves; in the latter, by the Readers. The young members of two years were required to be preſent at theſe readings, under pain of forfeiting twenty ſhillings for every default. The

CHAP. XXX.

HENRY VIII.

Grand Vacations were employed in other exerciſes for the advancement of knowledge; an Utter Barriſter was to oppoſe ſome point alledged by the perſon reading. The young members were called upon to argue ſome point in preſence of three Benchers; they were followed by the Utter Barriſters; and, laſtly, the Benchers were to decide. This was all carried on in Law French. Such was the form of Mooting. Exerciſes of this kind were performed not only in the Grand Vacations, but in Term.

After the Term and Grand Vacations, ſuch young men as were *No Utter Barriſters*, were to argue ſome points in Law-French before the Utter Barriſters, who were to decide in Engliſh: theſe were called *Mean Vacation-Moots*, or *Chapel-Moots*. Further, every day in the year but feſtivals, the ſtudents of each meſs, being three, uſed to argue among themſelves after dinner and ſupper.

The *Middle Temple* uſed to provide two Readers, being Utter Barriſters, for the two inns of chancery, *Strand-Inn* and *New Inn*. Theſe read to the ſtudents there in Term and Grand Vacation: the ſtudents there mooted as in the Temple, and each Reader uſed to bring two with him from the Temple to argue and moot. It ſeems, alſo, that each of the four inns of court ſent two perſons to every inn of chancery to argue, and after ſuch debate the Reader uſed to give his opinion.

Such was the education of antient time in the inns of court and chancery. But this was all voluntary, none being, as the ſame manuſcript acquaints us, compelled to learn. We are informed alſo by the ſame authority, that the young ſtudents of the *Middle Temple* had their ſtudies and places of learning ſo unfortunately ſituated, that they were very much annoyed by the walking and communication of thoſe who were no learners. In the term-time, they were diſturbed by clients and clients ſervants reſorting to attornies and practicers, ſo that they might as well be in the open ſtreets as in their ſtudies. The ſame writer complains, that they had no place to walk in, and talk, and confer their learning, but in the church; which place, all the

the term-time, had in it no more quietneſs than the *Pervyſe of Pawle's* [d], by occaſion of the confluence and concourſe of ſuch as were ſuitors in the law [e]. Owing to this houſe having no revenue for the encouragement and ſupport of ſtudents, it is obſerved by this writer, that many a good wit was compelled to forſake ſtudy, before he had acquired a perfect knowledge in the law, and *to fall to practiſing, and become a typler in the law* [f].

In the 32d Henry VIII. an order was made in the Inner Temple, that the gentlemen of that company ſhould reform themſelves in their cut or diſguiſed apparel, and not wear long beards; and that the treaſurer of that houſe ſhould confer with the other treaſurers of court for an uniform reformation, and to know the juſtices opinion therein [g]. In Lincoln's Inn, by an order made 23d Hen. VIII. none were to wear cut or panſied hoſen or breeches, or panſied doublet, on pain of expulſion [h]; and all perſons were to be put out of commons during the time they wore beards [i]. The firſt ſerjeants at law that received the honour of knighthood, were knighted in 26th of Hen. VIII [k].

In the 37th Henry VIII. a further increaſe was made in the fees of the judges: To the chief-juſtice of the king's bench, 30l. per ann.; to every other juſtice of that court, 20l. per ann.; to every juſtice of the common-pleas, 20l. per ann [l]. There is a manuſcript of this reign which ſets forth the whole ceremony of calling ſerjeants; but it is too long for this place, and may be ſeen in Dugdale [m].

[d] We have before noticed the cuſtom of Serjeants chooſing their pillar at St. Paul's, and taking down their client's caſe on their knee *. That cuſtom, together with the mention of the *Pervyſe of Pawle's*, on this occaſion, ſeems to open a paſſage in Chaucer's character of the Serjeant at law.

A ſergeaunt of the law both ware and wiſe,
That oftin had yben at the Pervyſe.
PROL. CANT. TALES.

* Vid. ant. vol. II. 360.

[e] Dugd. Orig. 193.
[f] Ibid.
[g] Ibid. 148.
[h] Ibid. 241.
[i] Ibid. 243.
[k] Ibid. 137.
[l] Ibid. 110.
[m] Ibid. 114.

CHAP. XXXI.

EDWARD VI.

PHILIP and MARY.

from 1547 to 1558

The Reformation eſtabliſhed—Act of Uniformity—The Roman Catholic Religion re-eſtabliſhed—and the Papal Authority—The Royal Authority of a Queen—The Poor Laws—Tipling and Gaming Houſes—Payment of Tythes—Traverſe of Offices—Sale of Horſes—Adminiſtration of Juſtice—Criminal Law—Repeal of Treaſons and Felonies—Houſe-breaking—Offences againſt the Common-Prayer—Unlawful Aſſemblies—Robbing in a Booth or Tent—Of the Revivor of Stat. 25 Hen. VIII. c. 3.—Trial of Felons in Foreign Counties—Clerks Convict—Repeal of Treaſon, Felonies, and Præmunire—Riotous Aſſemblies—Puniſhment of Gypſies—Stealing of Women—Of Bail—Of Witneſſes in Treaſon.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

IT could hardly be expected that the ſhort period of twelve years ſhould be productive of much alteration in our laws: but theſe two reigns, on the contrary, hold a diſtinguiſhed place in our juridical hiſtory. An attention to the reformation of religion in the former, and a determination in the latter to bring all things back to their antient ſtate, almoſt wholly engaged the princes on the throne. Theſe revolutions called for a frequent interference of the parliament. In the midſt of theſe changes, ſome acts were paſſed, which had great influence on the adminiſtration of juſtice; and others, relating to our criminal law, which

are

are more particularly deſerving of notice. Mean-while, the activity and deſigns of the government were ſuch, that theſe two reigns are fruitful of intereſting facts regarding the practice and execution of our penal laws.

THE attack made on the hierarchy in the reign of Henry, by taking away the authority of the Pope over perſons and cauſes of a ſpiritual nature, prepared the way for a complete reformation. When the ſyſtem of papal ſubordination was once broken, a new regulation in doctrine and worſhip might be accompliſhed with leſs obſtruction and difficulty. This was the work of Edward VI.'s reign.

GREAT part of the nation were diſpoſed to an alteration in the eſtabliſhed form of religion, from a conviction of its vanities and foppery. Thoſe who ſtill adhered to the old ſuperſtition, ſaw themſelves without the ſanction they once derived from the holy ſee, and the privileges of churchmen. The clergy, now reduced under ſubordination to the king as ſupreme head, had ſunk into the condition of their fellow-ſubjects. In this ſtate of things there was leſs danger to be apprehended from oppoſition to any reformation that might be attempted.

The Reformation eſtabliſhed.

THE firſt act of the legiſlature was intended for the abolition of the maſs, with all its numberleſs abuſes and ſuperſtitions, which was to be done by reſtoring the communion to its primitive inſtitution. This was by ſtat. 1 Ed. VI. c. 1. which contains a long and accurate preamble concerning the appointment of this ſacrament by Chriſt; ſtating, that it is "called in Scripture a ſupper, "the table of the Lord, the communion and partaking of "the body and blood of Chriſt; but that many perſons "had condemned in their hearts the whole thing, on ac-"count of certain abuſes heretofore committed in the "miſapplication of it." For theſe reaſons it was enacted, in the firſt place, that whoſoever ſhall deprave, deſpiſe, or contemn the ſacrament, by contemptuous words, or otherwiſe, ſhall ſuffer impriſonment, and make fine, at the king's

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

king's pleaſure: the offence is to be enquired of, by the oaths of twelve men, at the quarter-ſeſſions; the indictment to be brought in three months after the offence; and a writ is to be directed to the biſhop of the dioceſe to attend in perſon, or by deputy, at the ſeſſions.

But the principal object of the act was to reſtore the communion in both kinds, which the preamble ſays, "was more agreeable both to the firſt inſtitution of the "ſacrament of the body and blood of Chriſt, and alſo more "conformable to the common uſe and practice of the apoſ-"tles, and of the primitive church, for 500 years and "more after Chriſt: and further, that it was more agree-"able to the firſt inſtitution, and the uſage of the primi-"tive church, that the people being preſent ſhould receive "the ſame with the prieſt, than that the prieſt ſhould re-"ceive it alone." It is therefore enacted, that the ſacrament ſhall be miniſtered to the people within the church of England and Ireland, and other the king's dominions, under both kinds; and the miniſter ſhall not, without lawful cauſe, deny the ſame to any perſon. However, there is no enacting clauſe concerning the prieſt not taking it alone; nor are there any penalties annexed.

The next ſtatute made by the parliament was ſtat. 1 Ed. VI. c. 2. and this had the Reformation in view. Having ſtated that elections of biſhops by *congé d'élire* were mere ſhadows of elections, and attended with great delay and expence, and that they ſeemed derogatory and prejudicial to the king's prerogative, it provides, that they ſhall in future be appointed by the king's letters patent. All proceſs was to be in the king's name, but the *teſte* in that of the biſhop; except the archbiſhop of Canterbury, who might uſe his own ſeal.

Then follows ſtat. 1 Ed. VI. c. 12. which repeals[a] ſtat. 5 Rich. II. ſtat. 2. c. 5. and ſtat. 2 Hen. V. c. 7. that had

[a] Sect. 2.

been

been made againſt Lollards, and had been put in execution in the laſt reign: beſides theſe, it repeals ſtat. 25 Hen. VIII. c 14. concerning the puniſhment of heretics and Lollards; the ſtatute of the ſix articles, 31 Hen. VIII. c. 14.; ſtat. 34 & 35 Hen. VIII. c. 1. concerning the books of the Old and New Teſtament in Engliſh, the printing, reading, having, or ſelling them; and alſo ſtat. 35 Hen. VIII. c. 5. which qualifies the ſtatute of the ſix articles. All theſe ſtatutes in particular, and every other act of parliament concerning doctrine and matters of religion, were thereby repealed and made void. By the ſame act, there are penalties inflicted on thoſe who deny the king's ſupremacy, or affirm that the biſhop of Rome [b], or any other perſon, is, or ought to be, by the laws of God, ſupreme head of the church of England and Ireland.

THE laſt remains of ſuperſtitious eſtabliſhments were deſtroyed by ſtat. 1 Ed. VI. c. 14. which gave to the king all chantries, colleges, and free chapels; all lands given for the finding of a prieſt for ever, or for the maintenance of any anniverſary, *obit*, light or lamp in any church or chapel, or the like; all fraternities, brotherhoods, and guilds (except thoſe for myſteries and crafts), with all their lands and poſſeſſions. There are ſeveral exceptions in this act, which have ſaved ſome of the leaſt objectionable of theſe inſtitutions (ſtripped, however, of their ſuperſtitions), and ſuch as were only included in the expreſſions of the act, but not in its deſign; as the univerſities, and colleges for learning and piety.

THIS is followed by ſtat. 2 & 3 Ed. VI. c. 1. for the uniformity of ſervice, and adminiſtration of the ſacraments. This act ſtates, that there had been for a long time divers forms of common-prayer; as the uſe of *Sarum*, of *York*, of *Bangor*, and of *Lincoln*; and beſides theſe, many more

[b] Sect. 6.

forms

CHAP. XXX.

EDW. VI. PHILIP and MARY.

forms had of late been uſed, as well in morning and even-ing prayer, as in the communion, commonly called the maſs: that the king had endeavoured in vain to prevent other innovations of this kind, and therefore had appointed the archbiſhop of Canterbury and other biſhops to draw one convenient and meet order of prayer and adminiſtra-tion of the ſacraments, to be uſed all over England and Wales, which they had now performed in a book intitled, "*The Book of the Common-Prayer and Adminiſtration of the* "*Sacraments, and other Rites and Ceremonies of the Church,* "*after the Uſe of the Church of England*:" wherefore it was enacted, that every miniſter in cathedrals, pariſh-churches, and other places, ſhould be bound to ſay and uſe the ma-tins and even-ſong, celebration of the Lord's ſupper, com-monly called the maſs, and adminiſtration of each of the ſacraments, and all their common and open prayer, in ſuch order and form as is mentioned in the aforeſaid book, and not otherwiſe, under certain penalties which we ſhall hereafter mention. That the clergy might be relieved from the reſtraint which had been impoſed on them by the Romiſh church, in violation of the firſt command given by heaven to mankind, it is declared by ſtat. 2 and 3 Ed. VI. c. 21. that all laws, canons, conſtitutions, and ordi-nances, which forbid marriage to any eccleſiaſtical or ſpi-ritual perſon who by God's law may lawfully marry, ſhall be void: and to compel the performance of marriage, where engagements had been made, the ſtat. 32 Hen. VIII. c. 38. (only as far as concerned pre-contracts) was repeal-ed by ſtat. 2 and 3 Ed. VI. c. 23; and the eccleſiaſtical judge is thereby authoriſed to give ſentence for ſolemniza-tion of marriage, upon a pre-contract, as before that act.

THE foregoing laws were rather intended to inſtitute and build up, than to deſtroy; but ſuch ſteps having been taken, the Reformation was puſhed on with more vigour, and a ſort of perſecution was begun againſt the old ſuperſtition. It was enacted by ſtat. 3 and 4 Ed. VI. c. 10. that ſince the common-prayer had been ſet forth,

con-

containing nothing but the pure word of God, the corrupt, vain, untrue, and ſuperſtitious ſervices ſhould be diſuſed; and therefore all antiphoners, miſſals, grailes, proceſſionals, manuals, legends, pies, portuaſſes, primers, in Latin or Engliſh, couchers, journals, ordinals, and all other books, ſhould from thenceforth be aboliſhed: all perſons and bodies corporate having any ſuch books or images, taken out of churches or chapels, were to deſtroy ſuch images, and deliver ſuch books to the biſhop or his commiſſary within three months to be deſtroyed; and perſons who omitted ſo to do, were to forfeit for every book 20s. for the firſt offence; 4l. for the ſecond; and for the third, impriſonment at the king's will. And for putting to utter oblivion, as the ſtatute ſays, the uſurped authority of the ſee of Rome, as well as for the neceſſary adminiſtration of juſtice, the king was empowered, in like manner as Henry VIII. had been, by ſtat. 3 and 4 Ed. VI. c. 11. during three years to appoint thirty-two perſons to examine the eccleſiaſtical laws, and reform them; and by the ſame ſtatute, c. 12. to appoint ſix prelates and ſix other perſons to draw up a form and manner of making and conſecrating archbiſhops, biſhops, prieſts, deacons, and other miniſters of the church.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

THE execution of theſe two commiſſions took up the attention of the reformers, and ſome time was employed in altering the common-prayer-book, where exceptions had been made to it, or it was otherwiſe thought convenient to amend or enlarge it. After this was completed, at leaſt the form of ordination and the prayer-book (for the eccleſiaſtical laws took longer time, and after all were not finiſhed ſoon enough to be confirmed), a ſecond act of uniformity was paſſed, namely, ſtat. 5 and 6 Ed. VI. c. 1. This act begins by ſtating, that many perſons refuſed to come to their pariſh-churches, and other places where prayer, adminiſtration of the ſacraments, and preaching was uſed: it enacts therefore, that all perſons ſhould faithfully *endeavour themſelves* to reſort to their pariſh-church or chapel where the common-prayer and ſuch ſervice was uſed, upon every Sun-

Act of uniformity.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

Sunday and holy-day, and there abide during the time of common-prayer and preaching, upon pain of the cenſures of the church, which the biſhops are ſolemnly in God's name required to ſee executed; and they are thereby empowered to reform and puniſh all ſuch offences. And becauſe, ſays the ſtatute, many doubts had ariſen about the ſaid ſervice, "*rather by the curioſity of the miniſters and "miſtakers, than of any other worthy cauſe,*" the king had cauſed the book of common-prayer to be faithfully peruſed and made perfect, and now annexed it, ſo explained and perfected, to this act; at the ſame time adding a form and manner of conſecrating archbiſhops, biſhops, prieſts, and deacons, to be of like force and authority as the former, with the ſame proviſions as by ſtat. 2 and 3 Ed. VI. c. 1. were ordained; which ſtatute is declared to be in force for eſtabliſhing this book, now explained and perfected, and the form of conſecration and ordination. Any perſon being preſent at any other form of prayer than according to this book, is, for the firſt offence, to be impriſoned ſix months; for the ſecond, a whole year; and for the third, during life: for the better obſervation of this act, curates are directed once a-year to read it on a Sunday in the church, *at the time of the moſt aſſembly*. The next ſtatute[c] appoints the faſts and feaſts, as they are now in the calendar.

THE laſt ſtatute made upon the occaſion of theſe alterations in religion was ſtat. 5 and 6 Ed. VI. c. 12. to confirm and explain the former ſtat. 2 and 3 Ed. VI. c. 21. concerning the marriage of prieſts. The ſtatute ſays, that evil-diſpoſed perſons had taken occaſion, from certain words in that act, to ſay that it was but *a permiſſion, like that of uſury and other unlawful things:* and therefore, that children born from ſuch nuptials ſhould rather be accounted baſtards than legitimate. To avoid this ſlander, the ſtatute enacts poſitively, that the marriage of prieſts and ſpiritual perſons is true, juſt, and lawful, to all intents and purpoſes, and their children legitimate, as any other born in wedlock, as to inheritance and every other legal right.

[c] Cap. 3.

IT

IT was upon theſe acts of parliament that the reformed church ſtood at the death of Edward VI.

The Catholic religion re-eſtabliſhed;

QUEEN Mary ſoon overturned every thing which had been done in the former reign for a reformation of religion. After an act repealing all new-created treaſons, felonies, and caſes of præmunire, and another to eſtabliſh her own legitimacy, and declare null and repeal all ſentences, orders, and laws to the contrary; an act was paſſed, ſtat. 1 Ma. ſt. 2. c. 2. repealing all the under-mentioned ſtatutes, being all that were paſſed in her brother's reign for the reformation of the church; namely, ſtat. 1 Ed. VI. c. 1. againſt ſuch as ſpeak unreverently of the body and blood of Chriſt; ſtat. 1. Ed. VI. c. 2. relative to the election of biſhops; ſtat. 2 and 3 Ed. VI. c. 1. concerning uniformity of ſervice and adminiſtration of the ſacraments; ſtat. 2 and 3 Ed. VI. c. 21. made to take away all poſitive laws againſt the marriage of prieſts; ſtat. 3 and 4 Ed. VI. c. 10. made for the aboliſhing of divers books and images; ſtat. 3 and 4 Ed. VI. c. 12. made for the ordering of eccleſiaſtical miniſters; ſtat. 5 and 6 Ed. VI. c. 1. made for the uniformity of common-prayer and adminiſtration of the ſacraments; ſtat. 5 and 6 Ed. VI. c. 3. made for the keeping of holy-days and faſting-days; and ſtat. 5 and 6 Ed. VI. c. 12. touching the marriage of prieſts, and legitimating their children: and it was moreover enacted, that all ſuch divine ſervice and adminiſtration of ſacraments as were moſt commonly uſed in England in the laſt year of Hen. VIII. ſhould be uſed through the realm, and no other.

THUS was the national worſhip brought back to the ſtate it was in at the death of Henry VIII.; and that it might be performed without diſturbance or impediment, it was enacted by ſtat. 1 Ma. ſt. 2. c. 3. that any perſon who by word or deed ſhould maliciouſly moleſt any preacher, authoriſed to preach, in his ſermon, preaching, or collation; or ſhould maliciouſly diſturb any lawful prieſt, preparing or cele-

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

celebrating the maſs, or other ſuch ſervices, ſacraments, or ſacramentals, as were moſt commonly uſed in the laſt year of Henry VIII. or ſpoil or deface the ſacrament commonly called the ſacrament of the altar, or the *pix*, or canopy where the ſacrament was; or break any altar, crucifix, or croſs in any church, chapel, or church-yard; ſuch offender ſhould be taken before one juſtice, who, if he thought fit, was to commit him to cuſtody: and within ſix days the ſame juſtice, with another, was to examine him; and if he was convicted by two witneſſes, or his own confeſſion, they were to commit him for three months, and further to the next quarter-ſeſſions; when, if he did not repent, he was to be again committed till he became reconciled and penitent. If ſuch offenders were not immediately taken, the pariſh was to forfeit 5l. to be levied as in caſes of hue and cry by the ſtatute of Wincheſter, and ſtat. 3 Hen. VII. c. 1. Notwithſtanding this ſtatute, the ordinary might puniſh theſe offences by eccleſiaſtical cenſures, ſo as none were puniſhed twice. The penal proviſions of this act are much ſtricter than any the Reformers had made in the former reign, to ſecure their eſtabliſhment, in matters of the like kind.

and the papal authority.

SEVERER methods were now preparing for the correction of thoſe who did not conform to the religion of the court. By ſtat. 1 and 2 Ph. and Ma. c. 6. there is a revivor of ſtat. 5 Ric. II. ſt. 2. c. 5. concerning arreſting of heretical preachers; of ſtat. 2 Hen. IV. c. 15. touching repreſſing of hereſies, and puniſhment of hereticks; and of ſtat. 2 Hen. V. c. 7. concerning the enormity of hereſy and Lollardy, and the ſuppreſſion thereof. After theſe three penal laws were revived againſt hereſy, there follows a very long act of parliament, containing a hiſtory almoſt of the return of the nation into the boſom of the Romiſh church; and the complete re-eſtabliſhment of the pope's authority here, as it had been in the twentieth year of Hen. VIII. before the innovations begun in that king's reign.

THIS

THIS is ſtat. 1 and 2 Phil. and Ma. c. 8. It opens by ſtating, that "much falſe and erroneous doctrine had been "taught, and ſpread abroad here ſince the twentieth year "of Hen. VIII. ſo that as well the ſpirituality as the tem-"poralty had ſwerved from the obedience to the ſee apoſto-"lic, and declined from the unity of Chriſt's church, and "ſo continued until her Majeſty was firſt raiſed up by God "to the throne, and then married to the king; *to whom* "(*as unto perſons undefiled, and by God's goodneſs preſerved* "*from the common infection*) and to the whole realm, the "apoſtolic ſee had ſent *the lord cardinal Pole, legate de* "*latere*, to call them home again into the right way, from "whence they had a long while wandered: that they, ſee-"ing their errors, had acknowledged them (which the two "houſes did upon their knees [d]) to that moſt reverend fa-"ther, and by him were received, at the interceſſion of "the king and queen, into the unity and boſom of the "church; and that they then made an humble ſubmiſſion "and promiſe, for a declaration of their repentance, to re-"peal ſuch acts as had been made ſince the twentieth year "of Henry VIII. againſt the ſupremacy of the pope." Then follows the ſupplication of the two houſes to the king and queen, for them to intercede with the cardinal to obtain from the pope a remiſſion of all cenſures and ſentences which they had incurred by the laws of the church, and to be received into the church: all which having been performed, they now proceeded in this ſtatute to accompliſh their promiſe, and repeal all laws made againſt the ſupremacy of the ſee of Rome.

THE firſt repeal was of that part of ſtat. 21 Hen. VIII. c. 13. made againſt licences and diſpenſations from Rome for pluralities and non-reſidence; then the whole of ſtat. 23 Hen. VIII. c. 9. againſt citing out of the dioceſe where a perſon dwells, except in certain caſes: ſtat. 24 Hen. VIII.

[d] Burn. Ref. vol. II. 272.

c. 12.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

c. 12. that appeals in ſuch caſes as had been uſed to be purſued to the ſee of Rome, ſhould not be had or uſed within the realm: ſtat. 25 Hen. VIII. c. 19. called the ſubmiſſion of the clergy: ſtat. 25 Hen. VIII. c. 20. for non-payment of firſt-fruits to the ſee of Rome, and conſecration of biſhops within the realm: ſtat. 25 Hen. VIII. c. 21. concerning exonerating the king's ſubjects from exactions and impoſitions before that time paid to the ſee of Rome; and for having licences and diſpenſations within the realm, without ſuing further for them. All theſe ſtatutes are totally repealed; as was ſtat. 26 Hen. VIII. c. 1. concerning the king's highneſs being ſupreme head of the church of England, and to have authority to reform and redreſs all errors, hereſies, and abuſes in it: ſtat. 26 Hen. VIII. c. 14. for the nomination and conſecration of ſuffragans: ſtat. 27 Hen. VIII. c. 15. empowering the king to name thirty-two perſons, clergy and lay, for the making of eccleſiaſtical laws: ſtat. 28 Hen. VIII. c. 10. for extinguiſhing the authority of the ſee of Rome: ſtat. 28 Hen. VIII. c. 16. for the eaſe of ſuch as had obtained pretended licences and diſpenſations from the ſee of Rome: all that part of ſtat. 28 Hen. VIII. c. 7. which concerns a prohibition to marry within the degrees mentioned in the act: ſtat. 31 Hen. VIII. c. 9. authoriſing the king to make biſhops by his letters patent: ſtat. 32 Hen. VIII. c. 38. concerning pre contracts, and degrees of conſanguinity: ſtat. 35 Hen. VIII. c. 3. for the ratification of the king's ſtile: ſuch part of ſtat. 35 Hen. VIII. c. 1. as concerned the oath againſt the ſupremacy; and all oaths thereupon had, made, and given, were declared to be utterly void and repealed: ſtat. 37 Hen. VIII. c. 17. that doctors of the civil law, being married, might exerciſe eccleſiaſtical juriſdiction: that part of ſtat. 1. Ed. VI. c. 12. ſect. 7. which puniſhes thoſe who deny the king's ſupremacy. That clauſe and all other clauſes in that act contrary to the ſupremacy of the pope, and all other acts of parliament made ſince the twen-

twentieth of Hen. VIII. againſt the ſupreme authority of the pope's holineſs, are generally repealed.

BUT leſt the repeal of theſe laws, and the admiſſion of papal authority in all its plenitude, without any ſaving for ſuch eſtabliſhments and accidents which had been produced of late years, ſhould bring the property and condition of many into great hazard, and introduce the extremeſt confuſion, it was neceſſary to go further; and the parliament made another ſupplication to their majeſties to intercede with the cardinal, that the following points ſhould be ſettled by the pope's authority, *that all occaſions*, ſay they [e], *of contention, grudge, ſuſpicion, and trouble, may be taken away:* 1ſt, that all biſhoprics, cathedrals, or colleges, now eſtabliſhed, might be confirmed; 2d, that marriages made within ſuch degrees as were not contrary to the law of God might be confirmed, and the iſſue declared legitimate; 3d, that inſtitutions into benefices, and 4th, all judicial proceſs might be confirmed; and laſtly, that all ſettlements of land of biſhoprics, monaſteries, or other religious houſes, might continue as they were, without any trouble from eccleſiaſtical cenſures or the laws.

A SUPPLICATION likewiſe from the clergy [f] prayed, that the lands and goods of the clergy might remain as they were. The cardinal made a diſpenſation as to all theſe particulars [g], and granted them fully; which diſpenſation was now ratified in every point by the parliament. It is, however, in addition to this, enacted [h], that all perſons and bodies corporate, as well as the crown, ſhall enjoy all the poſſeſſions alluded to, as they were intitled to enjoy them before the firſt day of that parliament; and all aſſurances of land by Henry VIII. and Edward VI. are confirmed. But to encourage a renewal of like monaſtic inſtitutions, it was enacted, that perſons ſeiſed in fee might give lands to ſpiritual corporations without licence of mort-

[e] Sect. 25. [f] Sect. 31. [g] Sect. 32. [h] Sect. 36.

main,

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

main, or writ of *ad quod dannum*, notwithſtanding the ſtatutes of mortmain [1]; with reſerve of a tenure in frankalmoigne, or a tenure by divine ſervice, notwithſtanding the ſtatute of *quia emptores*: this licence to alien in mortmain to continue only for twenty years.

In fine it was declared, that the ſee of Rome was to have and enjoy ſuch authority, pre-eminence, and juriſdiction, as his holineſs did or might exerciſe by his ſupremacy (and the biſhops ſuch eccleſiaſtical juriſdiction) before the 20th year of Henry VIII. In this manner was the Roman Catholic religion and the papal authority again eſtabliſhed by law.

Having ſo far conſidered ſuch ſtatutes as effected alterations in religion, we ſhall now mention a remarkable one reſpecting the regal ſtate, and then proceed to thoſe concerning perſons and private property, with the adminiſtration of juſtice.

The royal authority of a queen.

The ſtat. 1 Mar. ſeſſ. 3. c. 1. ſets forth, that becauſe the ſtatute of the realm attributed all prerogative and pre-eminence to the name of *king*, together with the puniſhment and correction of offenders; therefore ſome malicious and ignorant perſons had pretended to think that the *queen* could not take the benefit and privilege of them: it then proceeds to make a declaration of the law on this point, and enacts, that the law of this realm is, that the kingly or regal office, with all its dignity, prerogative, and power, being inveſted either in male or female, ought to be *as fully deemed and taken in the one as in the other*; and whatever the law has appointed the king to have or do, the ſame the queen may enjoy and exerciſe without doubt or queſtion.

When the ſpeaker of the houſe of commons brought in this bill, many wondered what could be the intention of ſuch a law on a matter which ſeemed to be without diſ-

[1] Sect. 51.

pute.

pute. The ſecret deſign of this act was afterwards related by *Fleetwood*, the recorder of London, to Lord *Leiceſter*, from whoſe minutes of the ſtory a learned prelate has made it public [k]. The bill, as firſt brought in, declared alſo that the queen had as much authority as *any other of her progenitors*. It was objected to this, that ſhe was thereby declared to have as much authority as William the Conqueror, and might, like him, ſeize all the lands of Engliſhmen, and give them to ſtrangers: this ſuggeſtion, together with the jealouſy then entertained of the Spaniſh match, induced the houſe to go into a committee, where the bill was at length qualified, and made to ſpeak the language above-mentioned.

BUT the original motive for the act was this: a book had been preſented to the queen by the imperial ambaſſador, in which were ſketched the outlines of a plan of government for the queen to adopt. She was to take advantage of the notion, that all limitations by ſtatute on the regal power regarded kings, and not queens, of England; ſhe was to declare herſelf a conqueror; *or*, that ſhe ſucceeded by the common law, and not by ſtatute, which could not, upon the above-mentioned principle, bind her: and thus ſhe was to be at liberty to eſtabliſh religion and government as ſhe pleaſed. It is ſaid, that the queen, very much to her honour, expreſſed a diſlike of this bold performance, and thought the deſign contrary to her coronation oath; and having communicated it to *Gardiner*, in the ambaſſador's preſence, committed it to the flames, with ſome rebuke of his excellency for preſuming to tempt her with ſuch projects. Gardiner was alarmed at this bold beginning of the Spaniſh influence: and to prevent ſuch deſigns for the future, he drew this act, in which, though he ſeemed to intend an advantage to the queen, by putting her title beyond diſpute; yet he really meant that

[k] Burn. Ref. vol. II. 258.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ſhe ſhould be reſtrained by all thoſe laws to which the former kings of England had conſented.

We have not had occaſion to ſpeak of any parliamentary proviſion on the article of purveyance ſince the time of Edward III.[l] The only object had ſince been, to procure a due and regular execution of thoſe acts, without making any new ones[m]. As a popular meaſure, in the reign of Edward VI. the operation of purveyance was ſuſpended for three years, except for barges, ſhips, carts, and things neceſſary for carriages: it was provided, that for poſt-horſes a penny a mile ſhould be paid; for carts four-pence, if for the houſehold; if for the wars, three-pence[n]. This act, however, had no long continuance: but in the next reign ſome regulations of a permanent nature were made on this head. It was ordained by ſtat. 2 and 3 Ph. and Ma. c. 6. that no commiſſions of purveyance ſhould be for any more than ſix months: they were to contain the counties within which the purveyance was to be made, and oppoſite each county blanks, where were to be written the things to be purveyed in each, with their ſeveral prices, and the name ſubſcribed of the conſtables who were employed to procure them, and were privy to their delivery; a docket of which, ſubſcribed by the commiſſioner of purveyance, was to be lodged with the ſeveral conſtables upon the delivery; who were to give it to the juſtices of the place; and they were to certify the contents of ſuch dockets to the ſtewards of the houſehold. All former ſtatutes againſt purveyors and takers were thereby extended to their undertakers, deputies, and ſervants; and all commiſſions for purveyance were henceforward to be in the Engliſh language. By another chapter of the ſame ſtatute[o], it was ordained, in conformity with an antient privilege of the two univerſities, that there ſhould be no pur-

[l] Vid. ant. vol. II. 370.
[m] Vid. ant. vol. III. 272, 273.
[n] Stat. 2 and 3 Ed. VI. c. 3.
[o] Ch. 15.

veyance

veyance within five miles of Oxford or Cambridge, except when the king or queen came there.

THE article of vagrancy and begging ſeems to have become a greater grievance than ever; and in the ſolicitude to correct and ſuppreſs the effects of this evil, the parliament, during theſe two reigns, more than once changed its ſyſtem of conduct. The firſt interpoſition was by ſtat. 1 Ed. VI. c. 3. which laments the increaſe of vagabonds, and declares them to be *more in number than in other regions*. The deſign now was to treat ſuch offenders with extreme ſeverity: this act, therefore, begins with repealing all former laws for the puniſhment of vagabonds and ſturdy beggars; it then ordains, that any perſon may apprehend thoſe living idly, wandering, and loitering about without employment, being ſervants out of place, or the like, and bring them before two juſtices, who, upon proof by two witneſſes, or confeſſion of the party, were to adjudge ſuch offender to be a vagabond, and to cauſe him to be marked with a hot iron on the breaſt with the mark of V, and adjudge him to be a ſlave to the perſon who brought and preſented him, and to his executors, for two years. The perſon was to keep him on bread, water, or ſmall-drink, and refuſe-meat, and cauſe him to work by beating, chaining or otherwiſe, in any work or labour he pleaſed, be it ever ſo vile. If ſuch ſlave abſented himſelf from his maſter within the two years, for the ſpace of fourteen days, then he was to be adjudged by two juſtices to be marked on the forehead, or the ball of the cheek, with a hot iron with the ſign of an S, and farther adjudged to be a ſlave to his maſter for ever; and if he run away a ſecond time, he was to be deemed a felon. Any perſon to whom a man was adjudged a ſlave, had authority to put a ring of iron about his neck, arm, or leg. A ſimilar courſe of treatment was by act directed for clerks convict, which will be conſidered in another place.

The poor laws.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ANY child of the age of five years, and under fourteen, wandering with or without ſuch vagabonds might be taken, and adjudged by a juſtice to be ſervant or apprentice to the apprehender till twenty years of age if a female, and twenty-four if a man-child: the child to be treated as a ſlave, and puniſhed with irons or otherwiſe, if he run away. The maſter might aſſign and transfer ſuch ſlaves for the whole or any part of their time. If ſuch ſlaves, either during their ſlavery, or after they were ſet free, beat or wounded their maſters, or conſpired with others ſo to do, they were to ſuffer as felons, unleſs the perſon injured would take the offender as a ſlave for ever.

IF vagabonds were not apprehended in the before-mentioned manner, every juſtice was required to make ſearch for, and examine all perſons of that deſcription; and having enquired of any one ſo apprehended, the town, city, or village where he was born, he was to ſend him, with a writing on parchment teſtifying his vagrancy and ſettlement, from conſtable to conſtable, to the head officer of ſuch place; to be made a ſlave to the inhabitants thereof, in ſome public works, for the term, and under all the circumſtances before-mentioned in the caſe of any private maſter; with a penalty on the place, if ſuch ſlave was ſuffered to paſs three working-days without employment. Such towns and the inhabitants might aſſign or transfer their ſlaves, as private maſters. If it happened that the vagabond was not born at that place, he was to be made a ſlave to the inhabitants for the lie he had told, and was to be marked with an S. Foreign vagabonds were to be treated in the ſame manner as Engliſh, except the marking in the breaſt or face; and they were to be ſent to the next port to work till they could be conveyed abroad, at the coſt of the inhabitants.

THUS far of vagabonds: thoſe idle perſons, who, from their infirmities, could not be properly treated as ſuch, and who were born, or had been for the moſt part converſant

ſant and abiding for the ſpace of three years in any place, were to be ſought out before a certain day mentioned in the act, by the head-officer of the place, and provided with cottages, or other convenient houſes to be lodged in, and relieved and cured by the devotion of the good people of the place. None but ſuch as were born there, or had been converſant and abiding for the above ſpace, were after that day to remain and beg abroad within the precinct of the place: and a penalty was impoſed on the head-officer ſuffering it three days. For the clearing away of ſuch as were not ſo ſettled, head-officers were required to make a ſearch every month, and ſend them away in carts or otherwiſe, from conſtable to conſtable, to their proper ſettlement, under penalty for neglect of ſuch ſearch. If ſuch infirm perſons were not wholly diſabled from working, the inhabitants were to provide them work in common, or appoint them to ſuch private perſons as would; and ſuch as refuſed to work, or run away, were to be puniſhed diſcretionally with chains, beating, or otherwiſe. For the promotion of this plan, the parſon or curate every Sunday, after reading the goſpel, was to exhort the people to remember the poor people, their brethren in Chriſt, born in the ſame pariſh, and needing their help.

THE parliament did not reſt content with this act. The great and unexampled ſeverity of thoſe proviſions about ſlavery had prevented it from being carried into execution. Something new was therefore done on this ſubject a few years after. By ſtat. 3 and 4 Ed. VI. c. 16. the beforementioned ſtatute and every other act on this ſubject, except ſtat. 22 Hen. VIII. was repealed; and it was ordained, that the ordering of vagrants and beggars ſhould depend upon ſtat. 22 Hen. VIII. c. 12.* which ſtatute was confirmed for ever: in addition to which this ſtatute re-enacts all the proviſions of the former act of this reign reſpecting ſettlements, the paſſing of vagrants, the providing for the infirm, and ſetting them to work, in the very words of

* Vid. ant. 225.

that

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

that ſtatute, except the puniſhment of ſlavery. The direction about children was altered in this way: the child was to be brought into the open ſeſſions by the apprehender, who was to promiſe to bring it up in honeſt labour till, if a woman, the age of fifteen; if a man, of eighteen; upon which the juſtices were to adjudge the child to be a ſervant, *according as the law and cuſtom of the realm is of ſervants without wages*. If the child ran away, it was to be puniſhed by the ſtocks, or at the maſter's diſcretion, who might alſo have a juſtice's warrant under the ſtatute of labourers; and if any perſon inticed ſuch child away, the maſter might have an action on the ſtatute of labourers. Two neighbours might complain to the ſeſſion if the child was maltreated, and the juſtices might diſcharge him from the ſervice, and aſſign him to another maſter.

In the following parliament this matter was again taken up. By ſtat. 5 and 6 Ed. VI. c. 2. the ſtat. 22 Hen. VIII. c. 12. and ſtat. 3 and 4 Ed. VI. c. 16. were confirmed; ſubject, however, to the following corrections. The firſt of theſe amendments has more the appearance of a compulſory levy for ſupport of the poor, than any thing we have yet met with. In cities, boroughs, and towns corporate, the mayor or head-officer, and in other pariſhes the vicar or curate and the churchwardens, were to have a regiſter of the inhabitants and houſholders, and of the needy perſons not able to ſupport themſelves; and with this, they were, in the church, quietly after divine ſervice, to call together the inhabitants and houſholders, and elect and nominate out of them, yearly, two or more to be collectors of alms. Theſe collectors, the Sunday following, while the people were at church, and had heard God's holy word, were gently to aſk and demand of every man and woman, what they would be content to give weekly towards the relief of the poor, which was to be written in the regiſter. After this, the collectors were to gather and diſtribute

ſuch

ſuch alms weekly to the poor for their ſupport, or to put them to labour, as it ſeemed beſt. Theſe collectors were to account to the principal perſons beforementioned every quarter, at which any of the pariſh might be preſent; and when they went out of office, they were to deliver over all ſurpluſſes to the common cheſt of the church. If they refuſed to account, the ordinary might proceed againſt them with ſpiritual cenſures. If any refuſed to contribute, the parſon, vicar, or curate, and churchwardens were gently to exhort him towards the relief of the poor: if he would not be perſuaded, then, upon certificate of the parſon, vicar, or curate, the biſhop might ſend for him, and try to perſuade him, and ſo, according to his diſcretion, take order for the reformation thereof.

In the next reign we find another act for the relief of the poor. By ſtat. 2 and 3 Ph. and Ma. c. 5. the two favourite ſtatutes, 22 Hen. VIII. c. 12. and 3 and 4 Ed. VI. c. 16. were confirmed, and declared to be in full force; after which, this act goes on to exact the ſame proviſions as had been made by ſtat. 5 and 6 Ed. VI. about appointing collectors, with their gathering, diſtribution, and accounts. To this it was now added, that if a pariſh was too ſmall to ſupport its own poor, then, upon certificate to the juſtices of the county, two of them, upon examination of the matter, might grant a licence under ſeal to ſuch of the poor as they thought proper, to beg abroad. In towns, the chief officer was to exhort a wealthy pariſh to aſſiſt a poorer. If perſons ſo licenſed to beg exceeded the limit preſcribed to them, they were to be puniſhed as vagabonds, according to ſtat. 22 Hen. VIII. Such licenſed perſons were to have a badge on the breaſt, and back of the outer garment. This act was only temporary, and at the end of the firſt ſeſſion of the next parliament it expired; ſo that the regulation of the poor, at the cloſe of this reign, ſtood upon ſtat. 22 Hen. VIII. c. 12. ſtat. 3 and 4 Ed. VI. c. 16. and ſtat. 5 and 6 Ed. VI.

CHAP. XXXI.

DEW. VI. PHILIP and MARY,

c. 2. and these were afterwards superseded by other regulations in the reign of queen Elizabeth.

For the better ordering of the military state, several provisions were made by statute in the reign of Ed. VI. respecting soldiers [p] and musters; and some acts passed for maintaining in vigour and readiness the antient militia [q].

To take away temptations to idleness is the most effectual way of guarding against the increase of that order of people who are the objects of the foregoing laws. A law was made to lessen the number of tipling and gaming-houses. By stat. 5 and 6 Ed. VI. c. 25. two justices have authority to remove and put away the common selling of ale and beer in common alehouses and tipling houses, in such towns and places as they thought meet. None were to keep such house, unless admitted and allowed in open sessions, or by two justices; and they were also to give a recognisance for not using unlawful games, and for the maintenance of good order and rule. This was to be certified to the sessions, where the justices might inquire by indictment, information, or otherwise, if such persons had broke their recognisance. Persons selling liquors without such authority, might be committed to gaol for three days, and till they entered into a recognisance not to keep any such house. The licences to keep gaming-houses, which were sanctioned, as we have seen, by the statutes of Hen VIII. [r] were greatly abused, and became the source of much evil. To remedy this, it was enacted, by stat. 2 and 3 Ph. and Ma. c. 9. that every licence, placard, or grant, for the keeping any bowling-alley, dicing-house, or for other unlawful games, should be null and void.

Tipling and gaming-houses.

The parliament were not inattentive to such objects as concerned the public weal, and improvement of the country. Among these, the first was agriculture. We find a

[p] Stat. 2 and 3 Ed. VI. c. 2 and stat. 4 and 5 Ph. and Ma. c. 3.

[q] Stat. 4 and 5 Ph. and Ma. c. 2.

[r] Vid. ant. 294.

statute

ſtatute of Edward VI. for the improvement of common and waſte lands [s], in confirmation of the ſtat. of Merton, c. 4. and ſtat. Weſt. 2. 13 Ed. I. * c. 46.; and further, all perſons recovering in an aſſiſe on either of thoſe ſtatutes, were to have treble damages. It was however provided, that where houſes had been built upon waſte grounds, not having three acres incloſed, and an orchard, garden, or pond, not exceeding two acres, which did no hurt to the waſte, and were a great convenience to the owner, they ſhould not be conſidered as within the meaning of the above ſtatutes. This proviſo was in favour of huſbandry and cultivation. The preferring of tillage to paſture, as had been done by former ſtatutes, with the ſupport of farm-houſes, and other expedients for promoting huſbandry, were inſiſted upon, and encouraged by ſeveral ſtatutes [t].

THE courſe of trade, and the conduct of manufactures, ſtill continued to engage the notice of the legiſlature; but the number of acts about buying and ſelling, retaining ſervants and apprentices, are too tedious to make a part of our enquiry. The principal of theſe was ſtat. 5 and 6 Ed. VI. c. 14. which gives a definition, and directs the puniſhment, of certain offenders againſt the fair dealer, called ingroſſers, foreſtallers, and regraters.

AMONG the regulations reſpecting trade, we may reckon the repail of the ſtat. 37 Hen. VIII. c. 9. concerning uſury. It is complained by ſtat. 5 and 6 Ed. VI. c. 20. that the former act had been conſtrued to give a licence and ſanction to all uſury not exceeding ten per cent.; but this conſtruction is declared to be utterly againſt ſcripture, and therefore all perſons are forbid to lend, or forbear by any device, for any uſury, increaſe, lucre, intereſt, or gain whatſoever, on pain of forfeiting the thing,

repeal

[s] Stat. 3 and 4 Ed. VI. c. 3.
[*] Vid. ant. vol. I. 263 and vol. II. 209.
[t] Stat. 5 and 6 Ed. VI. c. 5. Stat. 2 and 3 Ph and Ma. c. 7.

and

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

and the uſury, or intereſt, and of being impriſoned and fined; and ſo the law ſtood till the 13th of Elizabeth.

RESPECTING games and diverſions, an act was made in the ſpirit of thoſe in the time of Henry VIII. * about hand-guns, by which ſhooting hail-ſhot was prohibited abſolutely [u], even to perſons licenſed to ſhoot by the former acts. On the other hand, a ſtatute of Henry VIII. againſt the ſhooting of wild-fowl was repealed [x].

A PROPER adminiſtration of juſtice and of ſervices of truſt was promoted by an act againſt the ſale of offices. This is ſtat. 5 and 6 Ed. VI. c. 16. which enacts, that if any perſon ſell an office, or take any money or other profit, directly or indirectly, or any promiſe of it, for any office or deputation of office, or to the intent that any perſon ſhall have an office which concerns the adminiſtration or execution of juſtice; the receipt, or comptrollment or payment of any of the king's treaſure; or ſurveying of any of the king's caſtles, manors, lands; or any of the cuſtoms; or the keeping of any of the king's towns, caſtles, or fortreſſes; or any clerkſhip in a court of record; the perſon ſo taking any reward or promiſe of reward for ſelling, ſhall be judged to loſe and forfeit all right, intereſt, and eſtate, which he has in ſuch office; and the perſon making ſuch offer to purchaſe, ſhall be deemed incapable to enjoy the ſaid office: and all bargains, bonds, covenants, and agreements, concerning ſuch a tranſaction, are declared void. This act, however, is not to extend to offices of inheritance; nor to the parkerſhip, or keeping of any park, houſe, manor, garden, chaſe, or foreſt; nor to the chief-juſtices of the king's bench and common-pleas, nor to juſtices of aſſize; who are left at the ſame liberty to diſpoſe of offices as before this act.

Payment of tythes.

SEVERAL regulations were made by ſtat. 2 and 3 Ed. VI. c. 13. reſpecting the payment of tythes; all which contri-

* Vid. ant. 293. [u] Stat. 2 and 3 Ed. VI. c. 14. [x] Stat. 3 and 4 Ed. VI. c. 7.

buted

buted to ſecure the clergy in a more regular receipt of that inconvenient, though ſubſtantial and effective, proviſion. The act begins by confirming the ſtat. 27 Hen. VIII. c. 20. and 32 Hen. VIII. c. 7. * both made on the ſame ſubject, and with the ſame view. In order to further the intention of the makers of thoſe two laws, it moreover enacts, that every one of the king's ſubjects ſhall truly and juſtly, without fraud or guile, ſet forth and pay his predial tythes, in their proper kind, as they riſe and happen, in the manner they had been, or ought to have been paid for the laſt forty years before that act: and none ſhall carry away ſuch tythes before he has ſet forth the tenth part, or agreed for it with the parſon, vicar, or proprietor, under the penalty of forfeiting the treble value of the tythes ſo carried away. So far a temporal remedy in the ſecular courts is given for a breach of this duty. In the next clauſe of the act, a remedy is given in the ſpiritual court for the like injuſtice; for the act ſays, as often as the predial tythes ſhall be due, the party to whom they ought to be paid, or his deputy, may come and view them, to ſee that they are juſtly ſet forth. And if any perſon carry them away before they are ſet forth, or withdraw them; or prevent the parſon, vicar, or proprietor, or their deputies, from viewing them, as beforementioned, by reaſon whereof the tythe is loſt, impaired, or hurt; then, upon complaint to the ſpiritual judge, the party offending is to pay double the value of the tythes ſo taken, loſt, withdrawn, or carried away, beſides coſts of ſuit.

THESE are the two general proviſions relating to the collection of predial tythes: the remainder of this act is taken up with other matters incident to tythes of various kinds; all of which have been conſidered in a former part of this Hiſtory [y]. Perſons [z] who depaſture tythable cattle in waſte-grounds whereof the pariſh is not certainly

* Vid. ant. 222. [y] Vid. ant. 85. [z] Sect. 3.

known,

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

known, are to pay the tythe of ſuch cattle to the parſon or proprietor of the pariſh, hamlet, or town, where they dwell. Waſte-grounds which had paid no tythes before this act, by reaſon of their barrenneſs, were, at the end of ſeven years next after being fully improved, to pay tythe of corn and hay growing there [a]. Every perſon exerciſing merchandize, bargaining and ſelling, clothing, handicraft, or other art or faculty, who had paid perſonal tythes within forty years before this act, is yearly, before Eaſter, to pay for his perſonal tythes the tenth part of his clear gains; his charges and expences, according to his eſtate, condition, or degree, to be therein abated and deducted. But theſe proviſions were not meant to infringe either compoſitions real [b], or any cuſtom by which handicrafts-men might have formerly paid their perſonal tythe [c]. If any perſon refuſe to pay his perſonal tythe, as above ordered, the ordinary may call him before him, and may examine him by all lawful means other than by his own corporal oath [d], concerning the true payment thereof.

OFFERINGS and the tythes of fiſh are to be paid as heretofore, according to the cuſtom of different places [e]. It was provided, that the inhabitants of the city of London and Canterbury, with their ſuburbs, and every other town or place where they have been uſed to pay their tythe by their houſes, ſhall not be taken as within the meaning of this act [f]. A cuſtom which had prevailed in Wales, of demanding a tythe of cattle and other goods given at the marriage of any one, was hereby abrogated [g].

THE reſt of this act concerns judicial proceedings for recovery of tythes. Suits for ſubtraction of tythes, or any of the beforementioned duties, are to be in the eccleſiaſtical court, and not before any other judge [h]. Any

[a] Sect. 5.
[b] Ibid. 4.
[c] Ibid. 8.
[d] Vid. ant. 38.
[e] Sect. 10, 11.
[f] Ibid. 12.
[g] Ibid. 16.
[h] Ibid. 13.

party

party disobeying the ecclesiastical sentence may be excommunicated; and if he wilfully so remain for forty days after publication thereof in the parish-church or place where he dwells, the spiritual judge may signify the same to the king in chancery, and thereupon require process *de excommunicato capiendo*. That such suits may not be wantonly delayed by prohibitions, before any prohibition shall be granted, the party suing for it is to deliver to some of the judges of the court a true copy of the libel depending, and under the copy is to be written the suggestion; and if the suggestion is not proved by two honest and sufficient witnesses, within six months after the prohibition awarded, there is to go a consultation; and double costs and damages are to be recovered against the person suing the prohibition, to be assessed by the court granting the consultation. However, lest it might be imagined that the jurisdiction of the spiritual judge was intended to be hereby enlarged, it is provided, that [i] he shall not hold plea of any thing contrary to stat. West. 2. 13 Ed. I. c. 5. *articuli cleri, circumspectè agatis, silva cædua*, the treatise *de regiâ prohibitione*, or stat. 1 Ed. III. c. 10. [k] or of any matter which belongs to the king's court.

To protect the clergy in another instance, an act was made in the same sessions to moderate and qualify the penalty of deprivation from *all* their ecclesiastical preferment, inflicted by stat. 26 Hen. VIII. c. 3. on those who were certified by the collector not to have paid their tenths. It was now declared, by stat. 2 and 3 Ed. VI. c. 20. that such defaulter shall be deprived *ipso facto* of that only dignity, benefice, or other spiritual promotion, whereof the certificate shall be made; and they are no longer to be thereby disabled from enjoying any other benefice or preferment. The papistical piety of queen Mary dictated another application of tenths and first-fruits of

[i] Sect. 15. [k] Vid. ant. vol. II. 194. 215. 291. 375. 388.

ecclesiastical

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

eccleſiaſtical preferments. They were by ſtat. 2 and 3 Ph. and Ma. c. 4. no longer to be paid to the queen; and the tenths before that paid according to ſtat. 26 Hen. VIII. c. 3. were to be employed to other godly purpoſes.

THE ſtatutes which next deſerve our notice, are ſuch as relate to certain ſpecial modes of redreſs; as the traverſe of offices, the impounding of diſtreſſes, and the ſale of ſtolen horſes; after which will naturally follow ſuch alterations and improvements as were made, during theſe two reigns, in the more general remedies, and the execution of juſtice.

Traverſe of offices.

THE ſtat. 2 and 3 Ed. VI. c. 8. was made in favour of ſuch perſons as uſed ſometimes to be precluded of their rights * by untrue finding of offices. As for inſtance, perſons holding terms for years, or by copy of court-roll, were often put out of their poſſeſſion by reaſon of inquiſitions, or offices found before eſcheators, commiſſioners, and others, intitling the king to the wardſhip or cuſtody of lands, or upon attainders for treaſon, felony, or otherwiſe; and this, becauſe ſuch terms for years and intereſts in copyhold were not found: after which they had no remedy, during the king's poſſeſſion, either by traverſe or *monſtrans de droit*, becauſe ſuch intereſt were only chattels or cuſtomary hold, and not freehold. In like manner perſons having any rent, common, office, fee, or other profit *apprendre*, if ſuch intereſt were not found in the office intitling the king, they had no remedy by traverſe, or other ſpeedy means, without great and exceſſive charges, during the king's right therein. To redreſs theſe hardſhips on the ſubject, it is declared, that all perſons in the above caſes ſhall enjoy their rights and intereſts, the ſame as if no office or inquiſition had been found, or as they might if their intereſt had been regularly found at the ſame time in ſuch inquiſition or office [1]. Remedy was given where a perſon was found, untruly, to be heir of the king's tenant,

* Vid. ant. 231.

[1] Sect. 3.

and

and the like. And where a perſon is untruly found lunatic, ideot, or dead, and in ſome other caſes, it is enacted, that the party grieved ſhall have a traverſe, and proceed to trial therein; and have like advantages as in other caſes of traverſe upon untrue inquiſitions and offices [m]. The ſame of untrue finding, when a perſon is attainted of treaſon, felony, or *præmunire*, the party grieved may have a traverſe, or *monſtrans de droit*, without being driven to a petition of right [n]. In all traverſes taken according to this act, it is directed, that the perſon purſuing his traverſe ſhall ſue out a writ of *ſcire facias*, one or more, as the caſe ſhall require, againſt ſuch perſon as ſhall have an intereſt either by the king or by his patentee, in like manner as upon traverſes and petitions in other caſes, with like pleas to the defendants in the *ſcire facias* [o].

THE proviſions of this act do not come into ſuch common uſe as thoſe of the following. The ſtat. 1 and 2 Phil. and Ma. c. 12. has made ſome regulations on a ſubject which had not been touched by the parliament ſince the reign of Edward I †. It is thereby enacted, that no diſtreſs ſhall be driven out of the hundred where it is taken, except to a pound overt, within the county, not above three miles diſtant from the place where it was taken: and no cattle or goods taken by diſtreſs at one time, are to be impounded in ſeveral places, whereby the owner ſhall be conſtrained to ſue ſeveral replevins, under pain of an hundred ſhillings, and treble damages to the party grieved. Only fourpence is to be taken for poundage of one diſtreſs, under the penalty of 5l. For the more ſpeedy delivery of cattle taken by diſtreſs, every ſheriff, at his firſt county-day, or within two months next after he has received his patent of office, is to appoint, and proclaim in the ſhire-t own, four deputies at the leaſt, dwelling not above twelve miles from each other, who are to have authority, in his name, to make replevies, and deliverances of diſtreſſes,

[m] Sect. 6. [n] Sect. 7. [o] Sect. 13. † Vid. ant. vol. II. 112.

under

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

under the penalty of 5l. for every month that he neglects to make ſuch appointment.

THE ſtat. 2 and 3 Ph. and Ma. c. 7. made ſome regulations reſpecting the ſale of horſes in fairs and markets, which were deſigned to prevent the diſpoſal of ſtolen horſes, and thereby put a check upon that offence. The complaint was, that ſuch horſes uſed to be ſold in houſes, ſtables, or ſome bye-place, and the toll taken in private; "whereby the true owners," ſays the act, "were not able "to try the falſehood and covin between the buyer and "ſeller," and ſo were without remedy. It therefore enacts, That the owner, or chief keeper of every fair and market overt ſhall appoint a certain open place, within the town, where horſes uſed to be ſold at the time of the fair or market; in which place there ſhall be appointed a ſufficient perſon to take toll from ten o'clock in the morning to ſun-ſet, under pain of forty ſhillings. This toll-gatherer is to take ſuch tolls as are due for horſes at that place, between thoſe hours, and *at no other time or place*; and is to have before him, at the time, the parties to the bargain, with the horſe ſo ſold; and ſhall write in a book, kept for that purpoſe, the names and place of abode of the parties, and the colour, *with one ſpecial mark* at the leaſt, of the horſe. This book is to be brought, the next day after the fair or market, to the owner or chief keeper thereof, who ſhall cauſe a note to be made of the number of horſes ſold, and ſubſcribe his name, or ſet his mark to it.

Sale of horſes.

IT is moreover declared, that the ſale in a fair or market overt of any horſe that is thieviſhly ſtolen or felonioufly taken, ſhall not alter the property, unleſs it be, during the time of the fair or market, openly ridden, walked, or kept ſtanding for an hour at leaſt, between ten o'clock in the morning and ſunſet, in the open place where horſes are commonly uſed to be ſold, and the contract be made in the above manner; and the owner may ſeize ſuch horſe, or bring an action of detinue or replevin for it. The juſtices in their ſeſſions may enquire of all offences againſt this act.

Some

Some further proviſions of the like kind were afterwards made in the reign of queen Elizabeth [p].

Adminiſtration of juſtice.

We come now to ſuch acts as were made to promote a better adminiſtration of juſtice. It was enacted by ſtat. 2 and 3 Ed. VI. c. 25. that whereas the county courts in ſome ſhires were held from ſix weeks to ſix weeks, and attornies, not aware of that private cuſtom, ſued out proceſs with like returns as if they were held monthly, to the great delay and impediment of ſuitors, no county-court ſhall be longer deferred than one month. In order to quiet poſſeſſions, and facilitate the giving evidence of titles, it is enacted by ſtat. 3 and 4 Ed. VI. c. 4. that, reſpecting all letters patent made ſince 4th Feb. 27 Hen. VIII. a perſon may make title by way of declaration, plaint, avowry, title, bar, or otherwiſe, to lands, honours, and hereditaments, under the king's patentees, by ſhewing forth an exemplification or *conſtat* of the letters patent, which ſhall be of the ſame force and effect as the original.

The proceſs of the law was improved in one point by ſtat. 1 Ed. VI. c. 10. The writs of proclamation ordained by ſtat. 6. Hen. VIII. c. 4. * in caſes of outlawry, were to be directed to the ſheriff of the county where the party lived; but when the defendant lived in Wales, or a county palatine, they were made into the adjoining county. The preſent act directs, that where a defendant dwells in Wales, or in the county-palatine of Cheſter, or of the city of Cheſter, the juſtices of the court ſhall have authority to award a writ of proclamation to the ſheriffs of thoſe places: to them alſo are to be directed [q] writs of *capias utlagatum*, as immediate officers of the king's bench and common-pleas. The ſame was done by ſtat. 5 and 6 Ed. VI. c. 26. with reſpect to the county-palatine of Lancaſter. For receiving ſuch proceſs, thoſe ſheriffs are required to have deputies in the court of king's bench and common-pleas. As the ſtatute

[p] Stat. 31 El. c. 12. * Vid. ant. 261. [q] Sect. 4.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

of fines did not extend to the county-palatine of Cheſter, the ſame proviſion was made by ſtat. 2 and 3 Ed. VI. c. 28. to give effect to fines levied before the high-juſtice of Cheſter, or his deputy, as had been made in the laſt reign reſpecting fines in the county of Lancaſter [r]. By ſtat. 1 Ed. VI. c. 7. it is enacted, that no ſuit ſhall be diſcontinued by reaſon of the king's death; that the ſubſequent judicial proceſs ſhall be made out in the ſtile of the reigning king, and the variance in ſuch proceſs between the names of the kings ſhall not be error; that no aſſiſe of *novel diſſeiſin*, of *mortaunceſtor*, *juris utrùm*, or attaint, depending before the juſtices of aſſiſe, ſhall be diſcontinued by reaſon of death, new commiſſion, aſſociation, or not coming of ſuch juſtices; that though any plaintiff be made duke, archbiſhop, marquis, earl, viſcount, baron, biſhop, knight, juſtice of the one bench or the other, or ſerjeant at law, no writ or action ſhall be abateable; and that a juſtice of aſſiſe, of gaol-delivery, or of the peace, or a perſon being in any other of the king's commiſſions whatſoever, though preferred to any of the above honours, ſhall yet remain juſtice and commiſſioner, and execute his commiſſion as before.

MOREOVER it was enacted, that where a perſon is found guilty of any felony whatſoever, for which judgment of death ſhould or may enſue, and ſhall be reprieved, without judgment, and committed to priſon; any who ſhall be afterwards aſſigned juſtices to deliver that gaol, may give judgment of death, as the former juſtices might have done; and that no proceſs or ſuit before juſtices of aſſiſe, gaol-delivery, *oyer* and *termirner*, of the peace, or other commiſſioners, ſhall be diſcontinued by the publiſhing of any new commiſſion or aſſociation, or by altering the names of the juſtices or commiſſioners; but that the new juſtices and

[r] Vid. ant. 240.

other

other commiſſioners may proceed as if the old commiſſion had ſtill remained.

IT was enacted by ſtat. 1 Ma. ſt. 2. c. 7. that all fines whereupon proclamation has not been duly had, by reaſon of the adjournment of the term, ſhall be of the ſame force under ſtat. 4 Hen. VII. c. 24. as if the term had been regularly holden. The ſtat. 35 Hen. VIII. c. 6. which gave a *tales de circumſtantibus* to a plaintiff, was by ſtat. 4 and 5 Ph. and Ma. c. 7. extended to any iſſue to be tried between the king and a private party, or ſuch as purſue any ſuit for the king and themſelves; but ſuch *tales* muſt be on the requeſt of the king, or of the party ſueing *qui tam*.

AN explanation was made of ſtat. 32 Hen. VIII. c. 2. † concerning the limitation of actions, as to certain caſes, where it was often not poſſible, from the natural courſe of things, to lay the *eſplees*, ſeiſin, or preſentment within ſixty years. It was therefore declared by ſtat. 1 Ma. ſt. 2. c. 5. that that act ſhould not extend to any writ of right of advowſon, *quare impedit*, aſſiſe, *jure patronatûs*, nor to any writ of right of ward, writ of raviſhment of ward, for the wardſhip of the body, or of any honor, caſtle, or lands, nor to the ſeiſor of ſuch wardſhip.

IN reviewing the changes made in our criminal law during theſe two reigns, we ſhall firſt go thro' the ſtatutes of Edward VI. and then proceed to thoſe of queen Mary. The criminal law was very materially affected by ſtatutes made in the reign of Edward VI. which we ſhall now mention in the order in which they were made. The ſtatute of 1 Ed. VI. c. 12. makes a kind of date in the hiſtory of offences, by repealing many harſh laws, and making ſeveral beneficial proviſions as well for the protection of the ſubject, as the puniſhment of delinquents. It is introduced by a preamble not unworthy of notice. Having ſaid, "that on the part of a prince, the people ſhould wiſh for "clemency and indulgence, and rather too much forgive-

Criminal law.

† Vid. ant. 267.

"ness and remission of royal power and punishment, than "exact severity and justice to be shewed; and that, on the "part of the subject, he should rather obey for love, than "strait laws; yet," it goes on, "sharper laws, as a "harder bridle, should be made to stay those men and facts "that might else give occasion of further inconvenience." "This consideration caused king Henry VIII. and other "his progenitors to make statutes very *strait*, *sore*, *extreme*, "*and terrible*, although then not without great considera-"tion moved and established; and, for the time, to the "avoidance of further inconvenience, very expedient and "necessary. But as in tempest or winter, one course and "garment is convenient; in calm or warm weather, a "more liberal ease or lighter garment both may or ought "to be followed and used; so we have seen divers strait "and sore laws made in one parliament (the time so re-"quiring), in a more calm and quiet reign repealed. "Which example the king being willing to follow, is con-"tented and pleased that the severity of certain laws be mi-"tigated and remitted." It is therefore ordained, that no act or deed being by statute made treason or petit-treason, shall be so deemed, but only such as are treason or petit-treason by stat. 25 Ed. III. st. 5. c. 2. and by this present act: and [s] all offences made felony by parliament since 23d April in the first year of Henry VIII. and all acts making such offences felony, are repealed: with the exception of all statutes concerning the counterfeiting of the coin of this realm, or of any other current within the realm; or concerning the bringing in of counterfeit money: nor was this repeal to extend to stat. 27 Hen. VIII. c. 2. * concerning those who counterfeited the king's sign manual, privy signet, or privy seal, their counsellors, aiders, and abetters [t]; nor to stat. 27 Hen. VIII. c. 17. † concerning a servant embezzling his master's goods [u]. It also declares, that in all cases of felony, except those mentioned

Repeal of treasons and felonies.

[s] Sect. 4. * Vid. ant. 274. [t] Sect. 8. † Vid. ant. 283. [u] Sect. 18.

in

in this act, every one found guilty upon his arraignment, or who confeſſes, or ſtands mute, or will not anſwer directly, ſhall have his clergy [x].

It alſo repeals, as we have before obſerved, the ſtatutes of Richard II. Henry V. and Henry VIII. againſt heretics: and after ſpecifying theſe ſtatutes by name, it repeals generally all acts of parliament concerning doctrine and matters of religion [y]. It likewiſe repeals [z] ſtat. 31 Hen. VIII. c. 8. that proclamations made by advice of the council ſhould be obeyed, as acts made by parliament; and ſtat. 34 and 35 Hen. VIII. c. 23. for the due execution of ſuch proclamations.

So far this act is employed in repealing certain laws of a ſevere caſt; the remainder of it is taken up either in enacting ſome new offences, or making ſome beneficial qualifications of criminal proceedings.

In the firſt place, it was ordained, if any perſon, by open preaching, expreſs words or ſayings, affirmed that the king was not, or ought not to be, ſupreme head of the church of England and Ireland, immediately under God; or, that the biſhop of Rome, or any other perſon was, or ought to be by the laws of God ſupreme head of the ſame churches; or that the king was not king of England, France, and Ireland; or if any one did compaſs or imagine, by open preaching, expreſs words or ſayings, to depoſe the king from his eſtate, or deprive him of his titles; or did openly publiſh or ſay, that any perſon other than the king of right ought to be king; every ſuch offender, his aiders or abettors, ſhould for the firſt offence forfeit all his goods and chattels, and ſuffer impriſonment during the king's pleaſure; for the ſecond offence, forfeit the iſſues and profits of his lands, benefices, and other ſpiritual promotions, for life, with his goods and chattels, and be impriſoned during life; the third offence to be high-treaſon, [a]. If the above

[x] Sect. 10. [y] Sect. 3. [z] Sect. 5. [a] Sect. 6.

offences

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

offences were committed by writing, printing, overt deed, or act, it was high-treaſon for every offence [b]. It was, beſides, enacted, for confirming the ſucceſſion eſtabliſhed by ſtat. 35 Hen. VIII. c. 1. * that if any of the king's heirs, or perſons to whom the crown was limited by that act, uſurped the one of them upon the other, or interrupted the king in the quiet enjoyment of the crown, it ſhould be adjudged high-treaſon.

AFTER enacting the above treaſons and offences, this ſtatute takes away clergy from perſons convicted or attainted of the following crimes: of murder of malice prepenſed; of poiſoning of malice prepenſed; of breaking of any houſe by day or by night, any perſon being then in the ſame houſe where the breaking ſhall be committed, and thereby put in fear or dread; for robbing of any perſon or perſons in the highway, or near the highway; or for felonious ſtealing of horſes, geldings, or mares; of felonious taking of any goods out of any pariſh-church, or other church or chapel. In all theſe caſes clergy is taken away, if the party is found guilty by verdict or confeſſion, or will not anſwer directly, or ſtands wilfully and maliciouſly mute [c].

FOR removing doubts and defining the extent of crimes, in two inſtances, it is declared [d] that concealment, or keeping ſecret any high-treaſon, ſhall be adjudged miſpriſion of treaſon; and that [e] all wilful killing by poiſoning ſhall be deemed wilful murder of malice prepenſed; it having been declared high-treaſon in the former reign [f].

SOME proviſions are made reſpecting incidents of trials, and the like. It is declared, that the ſtatutes made in the time of Henry VIII. and all clauſes of ſtatutes concerning challenge for the county, hundred, or peremptory challenge; or concerning the trial of foreign pleas, pleaded by murderers, felons, or other offenders, ſhall remain in force [g];

[b] Sect. 7.
* Vid. ant. 280.
[c] Sect. 10.
[d] Sect. 20.
[e] Sect. 13.
[f] Vid. ant. 282.
[g] Sect. 11.

which

which are ſtat. 35 Hen. VIII. c. 6. ſtat. 4 Hen. VIII. c. 2 ſtat. 22 Hen. VIII. c. 2. And where-ever a common perſon may have his clergy, as a clerk convict who may make his purgation; and alſo in all caſes where the privilege of clergy is taken away by this act (wilful murder and poiſoning of malice prepenſed only excepted); a lord of parliament and peer of the realm, having place and voice in parliament, by claiming the benefit of this act, though he cannot read, without any burning in the hand, loſs of inheritance, or corruption of blood, is to be deemed, for the firſt time only, as a clerk convict who may make purgation [h]; and ſuch a perſon is to be tried for *any* of the offences limited in this act by his peers, as in caſes of high-treaſon [i].

THAT the objection of bigamy might be no longer a cauſe for precluding any one from his privilege of clergy, it is declared, that perſons who have been ſundry times married to ſingle women or widows, ſhall, notwithſtanding, have this benefit [k]; and that the wife of any one attainted, convicted, or outlawed of any treaſon, petit-treaſon, miſpriſion of treaſon, murder, or felony, ſhall notwithſtanding enjoy her dower; a point which had been attempted in former parliaments in caſes of felony, but without ſucceſs [l]. The preſent act, as far as concerned treaſon, was repealed a few years after, as will be ſeen preſently.

FINALLY, reſpecting proſecutions it was enacted, that no perſon ſhould anſwer for any of the before-mentioned treaſons, by open preaching of words only, unleſs he was thereof accuſed within thirty days after the open preaching or words ſpoken; the accuſation to be made to one of the king's council, a juſtice of aſſiſe, or of the peace; and if the accuſers happened to be out of the realm during the thirty days, then the party was to be accuſed within ſix

[h] Sect. 14.
[i] Sect. 15.
[k] Sect. 16.
[l] Sect. 17. Vid. ant. vol. II. 467, 468.

months.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

months [m]. Further it is enacted, that no one ſhall be indicted, condemned, or convicted for any treaſon, petit-treaſon, miſpriſion of treaſon, or for any words before ſpecified, unleſs he be accuſed by two ſufficient and lawful witneſſes, or willingly, without violence, confeſs the ſame; concerning which laſt proviſion we ſhall ſay more hereafter.

Houſe-breaking.

AT preſent we ſhall make a remark upon one article of that clauſe of the ſtatute which takes away clergy from thoſe who are convicted "*of breaking of any houſe by day* "*or by night*, any perſon being then in the ſame houſe, "and thereby put in fear and dread." Theſe words, upon the face of them, appear to have enacted a nullity; for, as the breaking of a houſe by day or by night, though any body ſhould be put in fear, is not in itſelf a felony, it ſtands in no need of clergy, and the taking it away is in effect inflicting no penalty at all: however it is not to be ſuppoſed, that an act made upon ſuch full conſideration as this; ſeems to have been, would have contained a ſentence that was neither law nor ſenſe, in ſo material a point as this, and whatever may be the modern conſtruction of theſe words, they certainly, at the time, bore a meaning entirely conſonant to the notions of law then prevailing. It is moſt probable that the parliament here meant to take away clergy from *burglary*; the deſcription of which offence, we have ſeen, was in early times very large, and was not yet contracted to the preciſe compaſs in which it now is: and at the time this act was made, that offence might, in the minds of ſome, be ſufficiently deſcribed in the words of the ſtatute. The breaking a houſe by day or by night was, as before appears, in the reign of Edward III. burglary [n], though nothing was taken; and, notwithſtanding Fitzherbert, in his abridgement of that caſe, has ſaid it muſt be *with an intent to take away goods*, that requiſite

[m] Sect. 19. [n] 22 Aſſ. 95. Fitz. Cor. 264. Vid. ant. vol. III. 123, 124.

is

is not in the original report, but was added by himſelf, and might, perhaps, be only his own opinion, or at moſt only the opinion of his time. As to burglary being in the night only, the firſt determination, which expreſsly and finally ſays that it ſhall not be conſidered as ſuch, unleſs the breaking be by night, is a caſe in 4 Ed. VI. three years after this act[o]: if ſo, the breaking here deſcribed, without any thing more, comprehended a burglary as then underſtood: and probably the ſpecifying whether by day or by night, was to obviate the doubts, which, moſt likely, long ſubſiſted, before it was ſolemnly agreed that it muſt be by night.

But ſoon after this ſtatute, this offence began to be more expreſsly ſettled and defined. After the determination in 4 Ed. VI. which confined it to the night, we find a writer of queen Mary's time expreſsly ſaying, that there muſt be a *felonious intent* to rob or murder; as alſo, that it muſt be in the *night*[p]. When burglary was defined in this manner, the ſtatute 1 Ed. VI. c. 12. was defrauded, as it were, of its ſubject; and as the words no longer expreſſed any exiſting felony, they took away clergy from none. But that ſuch a proviſion might not be vain and uſeleſs, the courts, to whom are given the oracles of the law, have ſince thought proper to ſupply by conſtruction the defect which had thus accidentally been brought on the ſtatute. They argued, that the *breaking a houſe by night*, here certainly meant, that *breaking* and entering *by night, with intent to commit felony*, which is now called burglary; and that, as breaking a houſe by day is in itſelf no felony, therefore the breaking here meant, is ſuch a one as is attended with a *ſtealing* in a houſe after the breaking. In this manner were two crimes raiſed by conſtruction in the place of one originally intended, upon

[o] Bro. Cor. 185.

[p] Staunf. lib. 1. c. 24.

which

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

which the ſtatute might have its effect to take away clergy *.

Offences againſt the common-prayer.

THE next ſtatute which enacts any penalties, is the act of uniformity, 2 and 3 Ed. VI. c. 1. which inflicts ſeveral puniſhments on offences againſt the book of common-prayer. Thus it is ordained, that if any miniſter refuſe to make uſe of this book, or uſe any other, or ſhall preach or ſpeak any thing in derogation of it, and ſhall be thereof convicted by verdict, by his own confeſſion, or by *the notorious evidence of the fact* ¶, he ſhall forfeit the profits of ſuch of his ſpiritual benefices as the king pleaſes, for a whole year, and ſuffer impriſonment for ſix months; for the ſecond offence, ſhall be deprived *ipſo facto* of all his ſpiritual promotions, and be impriſoned a whole year; and for the third offence, be impriſoned during life. And if he has no benefice or ſpiritual promotion, he ſhall for the firſt offence be impriſoned for ſix months; and for the ſecond offence, during life. So far of the clergy.

AGAIN, if *any perſon whatſoever* ſhall, in any interludes, plays, ſongs, rhimes, or by other open words, ſpeak any thing in derogation of this book; or ſhall, by open fact or open threatenings, compel or procure any miniſter in any cathedral or church to ſing or ſay any prayers, or miniſter any ſacrament otherwiſe than in this book; or ſhall interrupt any miniſter in ſuch ſinging, ſaying, or miniſtering, he is to forfeit for the firſt offence 10l.; for the ſecond offence, 20l.; for the third offence, all his goods and chattels, and to be impriſoned during life: and if the 10l. is not paid in ſix weeks after conviction, he is to be impriſoned for three months; and if the 20l. is not paid in the ſame time, he is to be impriſoned for ſix months inſtead thereof: all theſe offences to be determined either

* The ſtatutes which take away clergy from *burglary*, and from *larceny in a houſe, with a breaking*, and *without a breaking*, create much confuſion. I have attempted to repreſent their diſtinct offices in a plain and obvious manner in the *Chart of Penal Law*.

¶ We have before ſeen, that this was legal evidence in the canon law. Vid. ant. 24.

at

at the assizes or sessions, with libertyto every archbishop or bishop to be associated to the justices. The indictment must be at the next sessions or assize; and the lords of parliament are to be tried for these offences by their peers. The jurisdiction of bishops is not hereby taken away; but they are to enquire and punish such offenders by ecclesiastical censures, so, however, as no one be punished both by the spiritual and temporal court for the same fact.

Unlawful assemblies.

The next penal statute was 2 and 3 Ed. VI. c. 5. against unlawful assemblies; an act which was occasioned by the late riots in many parts of England, and which provided some very heavy penalties to prevent the like disorders. It was made high-treason for twelve persons or more, being assembled together, to attempt to kill or imprison any of the king's council; or to alter any laws; and to continue together for the space of an hour, being commanded by a justice of peace, mayor, sheriff, or the like, to depart. It was made felony for twelve persons to practise to destroy any park, pond, conduit, or dovehouse; or to have common or way in any ground; or to pull down any houses, barns, or mills; or to burn any stack of corn; or to abate the rents of any lands, or the prices of victuals; and to continue together an hour, being commanded in like manner to depart. Concerning the provisions of this act, we shall have occasion to speak in the next reign. By c. 15. of the same statute, the publishing any false prophecy upon occasion of arms, fields, and the like, to the intent to make dissension, was to be punished for the first offence, by one year's imprisonment, and the forfeiture of 10l.; for the second offence, by forfeiture of all the party's goods, and imprisonment during life. Both these acts, being temporary, were left to expire in a few years. The remainder of the criminal acts passed in this reign are, the 9th, 10th, and 11th chapters of stat 5 and 6 Ed. VI. These are very material laws, and come now under consideration. We shall begin with the last, concerning treason.

This

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

THIS ſtatute enacts certain treaſons of the ſame kind with ſome made in the reign of Henry VIII.; however, with ſuch qualifications as diſcover more temper and moderation. If any perſon by open preaching, expreſs words or ſayings, affirmed that the king, or his heirs, or ſucceſſors, as appointed by ſtat. 35 Hen. VIII. c. 1. (being in poſſeſſion of the crown) was a heretic, ſchiſmatic, tyrant, infidel, or uſurper, he was for the firſt offence, to forfeit all his goods and chattels, and to be impriſoned during the king's pleaſure; for the ſecond offence, to loſe the iſſues and profits of his lands during life, and of all ſpiritual promotions, and ſuffer perpetual impriſonment; and for the third offence, he was to be adjudged a traitor.

But if the ſame offence was committed by *writing*, printing, painting, carving, or graving, it was made high-treaſon in the firſt inſtance. It was alſo enacted, that if any perſon rebelliouſly withheld any of the king's caſtles, fortreſſes, or holds, or his ſhips, ordnance, artillery, or other munitions of war, and did not give them up within ſix days after proclamation, it ſhould be high-treaſon. It was alſo provided, in purſuance of ſtat. 26 Hen. VIII. c. 13. and ſtat. 35 Hen. VIII. c. 2. * that ſuch treaſons, if committed out of the realm, ſhould be tried by commiſſion in any county; and outlawry pronounced againſt ſuch offender, though out of the realm at the time, was to be valid: to which it was now added by this ſtatute, that if ſuch perſon ſhould within a year after the outlawry pronounced ſurrender himſelf to the chief-juſtice of England, and offer to traverſe the indictment, he ſhall be received ſo to do; and if he is acquitted by verdict, he ſhall be diſcharged from the outlawry and all its forfeitures.

PERSONS who committed the above offences by open preachings or words, muſt have been accuſed within three months. It is moreover declared, generally, that perſons *convict* of high-treaſon ſhall forfeit all lands and tenements in which they have an eſtate of inheritance; and,

* Vid. ant. 299.

in

in repeal of ſtat. 1 Ed. VI. c. 12. ſect. 17. that wives whoſe huſbands have been attainted of treaſon ſhall not have dower [r].

THE reſt of this ſtatute is much in favour of the ſubject. There is a clauſe concerning miſpriſion of treaſon, ſimilar to that in ſtat. 1. Ed. VI. c. 12.; but the preſent, by the particular wording of it, evidently ſhews what was the deſign of theſe repeated declarations on this point: for the act ſays, that the concealment or keeping ſecret of any high-treaſon ſhall be deemed and taken *only* miſpriſion of treaſon; by which it was intended ſo far to ſet a limit to conſtructive treaſons. The next clauſe contains a wiſe proviſion concerning witneſſes on trials; and is thought to have been made in conſequence of what paſſed on the late trial of the duke of Somerſet, when the oppreſſion attending a contrary way of proceeding had excited a general indignation. It enacts, that no perſon ſhall be indicted, arraigned, condemned, convicted, or attainted, for any treaſon that now is, or hereafter ſhall be, unleſs he be thereof accuſed by two lawful accuſers; which, ſo far, ſeems to be little more than had been ordained by ſtat. 1 Ed. VI. c. 12. But this ſtatute goes further: it directs, that ſuch "accuſers, at the time of the arraignment of "the party accuſed, if they be then living, ſhall be brought "in perſon before the party ſo accuſed, and avow and "maintain That they have to ſay againſt the party "to prove him guilty, unleſs he ſhall willingly, without "violence, confeſs the ſame." The particular meaning of this and the other ſtatute of this king, with their effect and conſequences, will be conſidered, when we ſpeak of the ſtatute of Philip and Mary which was ſuppoſed to have repealed them.

THE ſtat. 5 and 6 Ed. VI. c. 9. next comes under conſideration. This act was made to explain the ſtat. 23 Hen-

Robbing in a booth or tent.

[r] Vid. ant. 471.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

Hen. VIII. c. 1. * upon which there had arisen three doubts: 1st, whether the owner or dweller must not be in the very chamber where the robbery was committed; a doubt that arose from a strict adherence to the notion of a proper robbery, where the taking must be in the presence of the person robbed: 2dly, whether the offender would lose his clergy if the owner or dweller was asleep; apprehending, probably, that in that state he could not be said to be put in fear, according to the requisite of the statute: 3dly, whether a booth or tent in a fair or market, in which dealers used to dwell and sleep during the continuance of such fairs, could be considered as a dwelling-house under that statute. To remove these doubts, it was declared and enacted, that any person found guilty for robbing of a person in any part or parcel of their dwelling-houses or dwelling-places, the owner or dweller in the same house, or his wife, his children, or servants, being then within the same house or place, where the robbery and felony shall happen to be committed and done, or in any other place within the precinct of the same house or dwelling-place, shall in no wise be admitted to his clergy, whether the owner or dweller in the same house, his wife and children then and there being, shall be sleeping or waking. Further, that any one found guilty of robbing a person in a booth or tent in a fair or market, the owner, his wife, his children, or servants, or servant, then being within the same booth or tent, shall not be admitted to the benefit of his clergy; but shall suffer death *in such manner as is mentioned in stat.* 23 *Hen. VIII. c.* 1. for robberies done in dwelling-houses, without any consideration whether the owner or dweller in such booths or tents, his wife, children, or servants, being in the same booths, be sleeping or waking. The latter part of this act is stated in this particular manner, because, as we shall presently see, there have arisen great doubts whether this stat. 23 Hen. VIII. c. 1. (or at least stat. 25 Hen. VIII. c. 3.

* Vid. ant. 286.

which

which is a ſupplement to it) be now in force; which, upon the preſent appearance of things in the courſe of this Hiſtory, muſt be anſwered in the negative; as they were, among other ſtatutes taking away clergy, repealed by ſtat. 1 Ed. VI. c. 12. ſ. 10. as we have before ſeen.

Of the revivor of ſtatute 25 Hen. VIII.

BUT as the doubt concerning theſe ſtatutes ariſes upon the next act, namely, ſtat. 5 and 6 Ed. VI. c. 10. we ſhall proceed to examine that. The preamble recites, that ſtat. 23 Hen. VIII. c. 1. had taken clergy away in certain robberies and burglaries; but extended only to thoſe who were convicted in the county where the fact was committed; and as ſuch felons often carried their ſpoil into another county, and if they were indicted there for the ſimple larceny, they had their clergy; that it was for theſe reaſons enacted, by ſtat. 25 Hen. VIII. c. 3. * that they ſhould loſe their clergy, as if indicted in the ſame county where the robbery or burglary was committed. Then it recites, that ſtat. 25 Hen. VIII. was repealed by a clauſe in ſtat. 1. Ed. VI. and that ſince offenders of this kind had enjoyed their former impunity; for redreſs whereof this ſtatute now enacted, "that the ſaid ſtat. 25 Hen. VIII. c. 3. "touching the putting of ſuch offenders from their cler-"gy; and every article, clauſe, or ſentence, in the ſame, "touching clergy, ſhould from thenceforth, touching "ſuch offences, remain, and be in full force, in ſuch man-"ner and form as it was before the making of ſtat. 1 Ed. VI. "c. 12." This is the effect of ſtat. 5 and 6 Ed. VI. c. 10.

IT became in after-times a queſtion, founded upon the operation of this ſtatute, whether the whole of ſtat. 25 Hen. VIII. c. 3. and alſo ſtat. 23 Hen. VIII. c. 1. were not thereby revived. The occaſion of this queſtion was as follows. A man was indicted † for wilful burning of a houſe. This offence, among others, was deprived of clergy by ſtat. 23 Hen. VIII c. 1. which extended to principals and acceſſaries before the fact being convicted

* Vid. ant. 317. † Powlter's Caſe, 10 Rep.

by

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

by verdict or confeſſion; but did not reach the caſe of perſons wilfully ſtanding mute, and the like: to remedy which defect, ſtat. 25 Hen. VIII. c. 3. ſ. 2. ouſted of their clergy ſuch offenders in thoſe caſes; and after that, made the proviſion we have before rehearſed concerning perſons indicted in one county for goods taken by robbery or burglary in another. Then came ſtat. 1 Ed. VI. c. 12. ſ. 10. which took away clergy from all felonies except thoſe enumerated in the act. Theſe are for the moſt part ſuch as were before deprived of clergy by ſtat. 23 Hen. VIII.; but there is no mention of *wilful burning of houſes*, nor of acceſſaries before the fact. Therefore, as ſtat. 23 Hen. VIII. and 25 Hen. VIII. were repealed, and ſtat. 1 Ed. VI. c. 12. had not provided for burning of houſes, it was a doubt in the caſe abovementioned, by what exiſting law the offender was ouſted of his clergy. It was there contended (and that ſeems to have been the opinion of *lord Coke*,) that this ſtat. 5 and 6 Ed. VI. c. 10. revived *the whole* of ſtat. 25 Hen. VIII. and conſequently, that wilful burning being named in the firſt clauſe among the offences enumerated in ſtat. 23 Hen. VIII. is ouſted by the general words, *every article, clauſe, or ſentence, contained in the ſame concerning clergy*. However, others[s] are of opinion, that, general as theſe words may ſeem, they muſt be reſtrained to that particular miſchief, which, it appears by the preamble, was alone in contemplation to be remedied: and ſome[t] remark, very juſtly, that the enacting clauſe in the latter part of it reſtrains theſe general words, ſo much relied on by lord Coke, to *ſuch offences* as are ſtated in the preamble.

But there was another ground of argument in the caſe beforementioned, on which, lord Coke ſays, ſome of the judges relied. The ſtat. 1 Ed. VI. c. 12. having taken away clergy only from principals, the ſtat. 4 and 5 Ph. and

[s] Among whom are *lord Hale* and *ſir Michael Foſter*.

[t] Namely, *ſir Michael Foſter*.

Ma-

Ma. c. 4. was made to take it away from acceſſaries before in the ſame offences; but this ſtatute, moreover, takes it away from acceſſaries before *in wilful burning*. Now ſome of the judges, ſays lord Coke, thought this ſolved the difficulty, and gave an interpretation to the former acts. For if the principal ſhould have his clergy, it would be abſurd, and what was never ſeen in our law, that clergy ſhould be taken from the acceſſary; and ſecondly, it would be in vain to take away clergy from the acceſſary, and leave the principal to have his clergy; for if the principal had his clergy before judgment, the acceſſary ſhould not be arraigned. And this *Sir Michael Foſter* thinks was the real ground upon which that determination reſted; ſo that, upon the whole, he is of opinion, that both 23 and 25 Hen. VIII. were repealed by ſtat. 1 Ed. VI; that the ſtat. 5 and 6 Ed. VI. c. 10. revived ſtat. 25 Hen. VIII. only *in part*, for the purpoſe therein mentioned; that therefore, both ſtat. 23 and ſtat. 25 Hen. VIII. continue otherwiſe repealed; and that the ſtat. 4 and 5 Ph. and Ma. put the matter out of doubt with regard to *arſon* [u].

WHATEVER ingenuity there may be in this way of reconciling the repugnance of ſtatutes *when they are made*, and allowing this to be a probable inference from the ſtat. 4 and 5 Ph. and Ma.; yet it is very difficult to imagine, that the legiſlature, having in contemplation to take away clergy from *principals*, ſhould take it only from *acceſſaries* expreſsly, and leave it to legal conſtruction to make the ſame concluſion as to principals; a method hardly ſuitable to the preciſion and determination of a legiſlative act. When we look back to the form and hiſtory of theſe ſtatutes, we find a want of conſiſtency in the parliament at different times, which only increaſes the obſcurity. The ſtat. 5 and 6 Ed. VI. c. 9. ſeems, from the language of

[u] Foſt. 331 to 336.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

it, to consider the stat. 23 Hen. VIII. as still in force; for it says, it *hath been* doubted respecting that statute in some points, and therefore provides for the explanation of those doubts: whereas, had that statute been looked on as repealed; if any doubts upon it had been thought worthy a parliamentary exposition; or rather, if it had been thought proper to re-enact any of its provisions; that statute, it should seem, would have been spoken of in another tense; namely, that it *had* been doubted. If the parliament entertained an opinion that stat. 23 Hen. VIII. was then in force, it must have been founded on the next chapter of stat. 5 and 6 Ed. VI.; which being thought to revive *in toto* stat. 25 Hen. VIII. (an act suppplementary to stat. 23 Hen. VIII.) thereby also revived stat 23 Hen. VIII. which opinion we have above seen was held by lord Coke many years after. Nor is it any objection to this supposition, that the reviving statute of 5 and 6 Edward VI. is placed in the statute-book subsequent to the explanatory act [x]; as there are many instances in this reign where acts that are later in point of time, are placed before former acts of the same session [y].

However the parliament might have formed their opinion on this point at the time, they soon afterwards thought differently; for early in the next reign it will be seen, there happened a case which called upon them to make, as it were, a decision on this question. They passed a special act for the purpose of taking away clergy from an accessary before the fact in murder; which offenders, as we have seen, are not deprived of that privilege by stat. 1 Ed. VI. c. 12.; and they thereby seemed to declare, that stat. 23 Hen. VIII. which had provided for this case, was not then in force. Pursuing the same idea, the legislature made an act some few years after, by stat. 4 and 5

[x] Cap. 9. and cap. 10.

[y] Stat. 5 and 6 Ed. VI. c. 3. of holidays and fasts, was introduced and passed both houses before the act of uniformity, cap. 1.

Ph.

Ph. and Ma. to take away clergy from acceſſaries before in all the offences where it was taken from principals by ſtat. 1 Ed. VI. c. 12. and alſo from acceſſaries in arſon; in which this ſtatute is very particular: for tho' it was intended evidently as a ſupplement to ſtat. 1 Ed. VI. yet it rather deviated from that, and purſued the words of ſtat. 23 Hen. VIII. which was at the ſame time regarded as a law not then in force; and by taking clergy from acceſſaries in arſon, when no ſtatute in force took it from the principals, created the above-mentioned doubt; and at length furniſhed, as it is thought, the reſolution of it. Thus, in every point of view, theſe ſtatutes are involved in obſcurity; and the main and only queſtion which renders the diſcuſſion of the point intereſting, can be ſolved no otherwiſe than by the aſſiſtance of refinement and conjecture.

Trials of felons in foreign counties.

To return to the order of time from which we have digreſſed, namely, ſtat. 5 and 6 Ed. VI. c. 10. of perſons committing a burglary or robbery in one county, and flying with the thing ſtolen into another; which leads us to mention another act made for the like furtherance of criminal juſtice, and the removal of like impediments: this was ſtat. 2 and 3 Ed. VI. c. 24. The preamble of the act ſtates two defects of the law. Firſt, that where a perſon, who was felonioufly ſtruck in one county, died in another, a lawful indictment could not be taken in either; for the jurors of the county where he was ſtruck, could take no knowledge of the death; nor could thoſe where the death happened, for the ſame reaſon, take cognizance of the ſtroke: ſo that there was no way of puniſhing ſuch offenders, neither by indictment, nor, as the ſtatute ſays, by appeal. The ſecond was, where thieves who had robbed or ſtolen in one county, conveyed their plunder into another: in which caſe, tho' the principal was attainted in one county, yet the jurors of the other could take no cogniſance of ſuch attainder; and therefore the acceſſary

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

went unpuniſhed. It appears, by a caſe mentioned in the laſt reign *, that the ſecond defect here ſtated was an obſtacle to juſtice; and however they might *try* a robbery, or murder, which was not complete in either county, by a jury of two; and tho' an *indictment* might be found of ſuch *ſtealing*; yet there is no caſe which had yet warranted an *indictment* of *killing*, where the ſtroke was in one county, and the death in another; but there is an expreſs determination in the reign of Henry VII. that though ſuch a murder might be proſecuted by appeal, it could not by indictment [z]. To remedy theſe defects, and remove all doubt, it was enacted, as to the firſt, that the jurors of the county where the death happens, may enquire, and an appeal may be brought, of the ſtroke in another; and in the ſecond caſe, that an indictment againſt an acceſſary ſhall be as valid as if the principal offence had been committed within the ſame county. The commiſſioners before whom the indictment is taken, are to write to the *cuſtos rotulorum* where the principal was attainted or convicted, to certify whether he was attainted, convicted, or otherwiſe diſcharged; which certificate is to be under the ſeal of the *cuſtos rotulorum*; and upon the receipt of it, the juſtices are to proceed againſt the acceſſary, as if the principal offence been committed in that county.

Some few other ſtatutes were made concerning crimes and puniſhments. The ſtat. 25 Hen. VIII. c. 6. making ſodomy felony without clergy, being repealed by the general clauſe of ſtat. 1 Ed. VI. c. 12. was revived by ſtat. 2 and 3 Ed. VI. c. 29. And becauſe it had been doubted whether the clauſe of ſtat. 1 Ed. VI. c. 12. which takes clergy from thoſe ſtealing horſes, geldings, or mares, inflicted the ſame penalty on thoſe who ſtole *one* horſe, gelding, or mare; it was declared by ſtat. 2 and 3 Ed. VI.

* Vid. ant. 397.

[z] Vid. ant. 178. 396.

c. 33.

c. 33 that it ſhould. This ſingular ſcruple was entertained in conſideration of this being a penal law, but the like had never been countenanced in caſes regarding property; for the ſtatute of Glouceſter, giving an action of waſte againſt one who holds for a term of years, had always been conſtrued to extend to a holding for *a year*[a].

THERE was a law made to puniſh offences committed in churches and church-yards by riotous and outrageous quarrels, as then often happened between the reformed and thoſe of the antient religion. Such offenders are conſidered in three different lights by this act, and differently puniſhed. Firſt, it is enacted by ſtat. 5 and 6 Ed. VI. c. 4. if any perſon, by words only, quarrel, chide, or brawl in any church or church-yard, he ſhall, if the offence be proved by two lawful witneſſes, be ſuſpended, if a lay man, *ab ingreſſu eccleſiæ*; if a clerk, from the miniſtration of his office, at the diſcretion of the ordinary. Secondly, if any one ſmite, or lay violent hands upon another, he ſhall be deemed *ipſo facto* excommunicate. And thirdly, if any maliciouſly ſtrike with a weapon, or draw a weapon to the intent to ſtrike ſuch perſon, and be convicted by the verdict of twelve men, or his own confeſſion, or by *two lawful witneſſes*, before the juſtices of aſſiſe, of *oyer* and *terminer*, or of the peace, in their ſeſſions, he ſhall have his ears cut off; and if he has no ears, ſays the ſtatute, he ſhall be marked in the cheek with a red-hot iron having the letter *F* therein, that he may be known for a *fray-maker and a fighter*; and ſhall moreover be deemed *ipſo facto* excommunicate.

Clerks verdict.

BEFORE we quit this ſubject of penal law, it will be proper to mention a proviſion made at the beginning of this reign with regard to clerks convict, which puniſhed vagrancy, as we have before ſeen, with ſlavery. It was enacted by ſtat. 1 Ed. VI. c. 3. that no clerk convict ſhould

[a] Plowd. 467.

make

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

make his purgation, but ſhould be a *ſlave* for one year to him who would become bound, with two ſureties, in 20l. to the ordinary, to the king's uſe, to take him into ſervice; and he was then to be treated as vagabonds were directed by that act to be treated in the like caſe. Again, a clerk attainted or convict, who by law could not make his purgation, might be delivered by the ordinary to any man who would become bound, with two ſufficient ſureties, to keep him as his ſlave five years, to be uſed as a vagabond; and every perſon to whom ſuch a one was adjudged a ſlave, might put a ring of iron about his neck, arm, or leg. This extravagant puniſhment, eſpecially under ſo hateful an appellation as that of ſlavery, was ill borne by the ſpirit of the nation; and was therefore repealed by ſtat. 3 and 4 Ed. VI. c. 16. as has been before related.

Repeal of treaſon, felony, and præmunire.

THIS was the ſtate of our criminal law at the time of queen Mary's acceſſion, when a ſtatute was made ſimilar to that paſſed at the beginning of Edward VI.'s reign, to aboliſh all new-created treaſons and felonies; though the repealing act of Edward VI. and the mildneſs of that reign, had left very little occaſion for ſuch a ſtatute. However ſuch a beginning had ſome ſmall effect in conciliating the minds of the nation to her government, till another ſpirit could with more ſafety diſcover itſelf. The preamble of the act, in ſtating a reaſon for making it, ſeems to glance at ſtat. 5 and 6 Ed. VI. c. 11. For it ſays, that "many honourable and noble perſons have of late "*(for words only, without other opinion, fact, or deed)* "ſuffered ſhameful death, not accuſtomed to nobles: to "remove the occaſion of which in future, the queen was "pleaſed" that no act, deed, or offence, being made treaſon, petit-treaſon, or miſpriſion of treaſon, by writing, cyphering, deeds, or otherwiſe, ſhall be ſo deemed, but only ſuch as is ſo declared by ſtat. 25 Ed III. And again, that all offences made felony (not being felony before), or

appointed

appointed to be within the caſe of *præmunire*, by any act made ſince the firſt day of Henry VIII.'s reign, ſhall be repealed and void.

THUS was the deſcription of treaſon once more reduced to the words of the ſtatute of Edward III. and the few felonies made in the laſt reign were aboliſhed. But, notwithſtanding this appearance of clemency, ſome treaſons and felonies were very ſoon enacted by parliament. In the next ſeſſion of that ſame parliament, it was ordained by ſtat. 1 Ma. ſt. 2. c. 6. in protection of a ſpecies of coin for which no law had before provided, that perſons who counterfeit gold or ſilver coin, not the proper coin of this realm, but current with the queen's conſent (and by ſtat. 1 and 2. Ph. and Ma. c. 11. thoſe who bring ſuch coin into the realm) ſhall be adjudged traitors; as alſo thoſe who counterfeit the queen's ſign manual, privy ſignet, or privy ſeal; for the ſtatute of Henry VIII. concerning theſe ſeals was repealed by the general clauſe of the former law.

Riotous aſſemblies.

IN the ſame ſeſſion an act was made againſt riotous aſſemblies, and to repeal the law made for the like purpoſe in the laſt reign[h]. This is ſtat. 1 Ma. ſt. 2. c. 12. which together with that of Ed. VI. deſerves notice, as they furniſhed a model for a ſimilar one made in later times; with this difference, that thoſe of Edward and Mary inflicted only the penalty of ſingle felony, that of George I. of felony without clergy. The act in queſtion declares it felony for any perſons to the number of twelve, being aſſembled together, to intend, or go about with force and arms, and of their own authority, to change any laws; and, being commanded by the ſheriff, or by any juſtice of the peace, mayor, or bailiff of any town or city, by proclamation in the queen's name, to retire to their houſes, to continue together for one hour after ſuch commandment, or to attempt any of the above-mentioned facts: and if perſons

[h] Vid. ant. 475.

to

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

to the number of twelve ſhould go about to overthrow pales, hedges, ditches, or other inclоſures, the banks of any fiſh-pond or conduit for water, to the intent the ſame ſhould lie open; or to have common there; or to deſtroy deer or conies; or to pull down any houſes, barns, mills; or to burn any ſtacks of corn; or to abate rents of lands or price of victuals, and ſhould refuſe in like manner to depart after proclamation, it was made felony. The raiſing of people to the number of twelve by ringing of bells, ſound of trumpet, or in any way, was likewiſe made felony, if the perſons ſo met together came within the former clauſes of the act; and if the *wife*, ſervant, or any other relieved any perſons, ſo aſſembled, with *victuals*, weapons, or other things, they were to be deemed felons. Thus far of riots committed by twelve perſons. If the like offences were committed by perſons above the number of two, and under that of twelve, they were to be impriſoned for one year: and finally, it was ordained, in a more comprehenſive manner, that if perſons to the number of forty aſſembled for the above purpoſes, or to do *any other felony or rebellion*, and ſo continued together for three hours after proclamation, they ſhould be adjudged felons: and any copyholder or farmer being required by the king's officer to aſſiſt in ſuppreſſing ſuch offenders, and refuſing ſo to do, was to forfeit his copyhold or leaſe during his life. This act was only temporary, and ſoon expired.

Some other of the penal laws of this reign were only temporary, and expired at the demiſe of the crown. Such was ſtat. 1 and 2 Ph. and Ma. c. 3. concerning reporters of news. The execution of ſtat. 3 Ed. I. c. 34. and 2 Ric. II. ſt. 1. c. 5. was thereby referred to juſtices of the peace; and it was moreover enacted, that any perſon convicted of ſpeaking maliciouſly any ſlanderous news of the king or queen, ſhould, for the firſt offence, be ſet in the pillory, and have both his ears cut off (unleſs he paid 100l.) and ſuffer three months impriſonment; and if ſlanderous

news

news were ſpoken of any common perſon, there was the ſame puniſhment, except that the impriſonment was to be only for one month; and if it was by book, rhime, ballad, letter, or writing, the offender was to have his right hand ſtricken off; and for the ſecond offence, he was to ſuffer impriſonment during life, and forfeiture of all his goods. The queen's jealouſy of offenders of this kind was ſuch, that an act was made in the ſame ſeſſion [c] which declared, that "perſons who *have* by expreſs words *prayed*, or here-"after ſhall pray, that God would ſhorten the queen's "days, or take her out of the way (as the conventiclers "in London were then ſaid to have done), ſhould be "deemed traitors:" but with reſpect to offenders who had committed this crime during that ſeſſion of parliament, and were indicted, ſuch perſons might, upon their arraignment, ſubmit themſelves to the queen's mercy, and then no judgment was to be paſſed; which *proviſo* took off the edge, in ſome degree, of this *ex poſt facto* law.

But the next act [d], of the ſame ſeſſion, went further; for, complaining that "the late clemency of the queen, in "relaxing penal laws, had given occaſion to many *cankard* "*and traitorous hearts* to imagine and attempt things "againſt the government;" ſome proviſions were now again made in the ſpirit of ſeveral acts of [e] Hen. VIII. and of one in the late reign. If any, by open preaching, expreſs words or ſayings, did compaſs or imagine to deprive the king of his ſtile and honour, or to deſtroy him; or to levy war againſt the king and queen; or did maliciouſly or adviſedly ſay that the king ought not to have ſuch title and ſtile; ſuch offender was to forfeit all his goods and iſſues of his lands during life, with perpetual impriſonment; and for a ſecond offence, he was to be adjudged a traitor. To do the ſame by writing, printing, overt deed, or act, was made

[c] Cap. 9. [d] Cap. 9. [e] Vid. ant. 273, 274, 469.

high-

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

high treaſon in the firſt inſtance. There is another treaſon made to protect the king's perſon, if he ſhould ſurvive the queen, and continue governor to the child of which the queen was then ſuppoſed to be pregnant. This act contains two clauſes concerning trials for treaſon, which we ſhall hereafter mention. It requires that indictments for words, under this act, ſhould be brought within ſix months; and now again declares, what had been twice decided by ſtatutes in the reign of Edward VI. that concealment of high-treaſon ſhall only be miſpriſion of treaſon.

THESE are all the penal ſtatutes made reſpecting the government; in which we ſee more caution and moderation than in thoſe of Hen. VIII. from which they were copied, though they went a little further than thoſe on the like ſubject in the reign of Edward VI. The remaining ſtatutes regarded common offences; and were, one concerning Egyptians, another reſpecting acceſſaries in certain felonies, and the laſt about the ſtealing of maidens.

Puniſhment of gypſies.

THE ſtatute of Henry VIII.[f] made againſt Egyptians, or gypſies, was found not ſtrict enough to reſtrain thoſe people from coming into the kingdom; but many ſtill reſorted hither, uſing, as the preſent act ſays, "their old "accuſtomed deviliſh and naughty practices and devices, "with ſuch abominable living as is not in any Chriſtian "realm to be permitted, named, or known." It is therefore enacted, by ſtat. 1 and 2 Ph. and Ma. c. 4. that any one conveying ſuch perſon into the realm, ſhall forfeit 40l.; and the Egyptian ſo conveyed, and continuing here one month, ſhall be adjudged a felon without benefit of clergy or ſanctuary. As to thoſe within the realm, ſuch as do not depart within twenty days after proclamation of that act, ſhall forfeit all their goods, to be ſeiſed by any one; half to the king, and half to the party ſeizing them: and if they do not depart in forty days after the proclamation, it is

[f] Vid. ant. 290.

made

made felony without clergy or ſanctuary. Perſons who leave that way of life within the twenty days above-mentioned, are to be diſcharged of the penalties of the act.

STAT. 4 and 5 Ph. and Ma. c. 4. to which we have before alluded, takes away clergy from acceſſaries before the fact, in the following offences: in petit-treaſon; wilful murder; robbery in any dwelling-houſe or houſes, robbery in or near any highway; the wilful burning of any dwelling-houſe, or any part thereof, or any barn, then having corn or grain in the ſame. Clergy is taken from all theſe offenders, being outlawed, or being otherwiſe attainted or convicted, or ſtanding mute of malice, or challenging peremptorily above twenty perſons, or not anſwering directly to the offence. This act was made as a ſupplement to ſtat. 1 Ed. VI. c. 12. which had taken away clergy from the principals in all theſe crimes. But in addition to the ſtatute of Edward VI. this act provides for the caſe of *burning of houſes*, which that act had omitted. The arguments and conſequences which have been founded on this particular circumſtance, have been fully conſidered before [g].

To this ſtatute is added a clauſe, which is to be found in ſeveral laws of theſe two reigns, that lords of parliament and peers ſhall be tried by their peers, for any offence mentioned in this act, as hath been accuſtomed by the laws of the realm: a caution which probably was occaſioned by ſome doubt then ſubſiſting, whether that privilege was allowed in new-made felonies and treaſons; though one ſhould think it was ſufficiently ſecured by the terms of *Magna Charta* [h].

THE ſtat. 4 and 5 Ph. and Ma. c. 8. was intended to carry further the policy of the ſtatute of Henry VII. [i] re- Stealing of women.

[g] Vid. ant. 480. 481.

[h] *Nullus liber homo, &c. &c. niſi per judicium parium ſuorum*, ca. 29. Vid. ant. vol. I. 249.

[i] Vid. ant. 145.

ſpecting

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ſpecting the ſtealing of heireſſes. As that act only puniſhed a man who committed ſuch an act againſt the conſent of the woman; this ſtatute was to reſtrain the like indecorum, even in ſome inſtances where ſhe did conſent. It is enacted, that if any perſon above the age of fourteen years ſhall unlawfully convey, or cauſe to be conveyed, away any woman-child unmarried, within the age of ſixteen years, out of the poſſeſſion, and againſt the will of her father or mother, or of ſuch perſon as then ſhall happen to have by any lawful means the order, keeping, education, or governance of any ſuch child, he ſhall ſuffer two years impriſonment, or elſe pay a fine, to be aſſeſſed in the ſtar-chamber.

AGAIN, if ſuch perſon ſhall ſo deflower ſuch woman-child, or by ſecret letters, meſſages, or otherwiſe, contract matrimony with her (except with conſent of ſuch as have title of wardſhip), he ſhall ſuffer impriſonment for five years, or elſe pay a fine, to be aſſeſſed in the ſtar-chamber; one moiety to the king, the other to the party grieved. Beſides this, it was provided, that if any woman-child, above the age of twelve, and under ſixteen years, conſent to ſuch contract, then the next of kin, to whom the inheritance ſhall come after her deceaſe, ſhall immediately enjoy all her lands in poſſeſſion, reverſion, or remainder, during the life of ſuch perſon as ſhall ſo contract matrimony. The offences herein deſcribed are to be heard and determined in the ſtar-chamber on a bill of complaint or information, and before the juſtices of aſſiſe by inquiſition or indictment.

THESE are all the ſtatutes which were made concerning crimes in the reign of queen Mary and her conſort. It remains now to ſpeak of ſuch as regarded the method of bringing offenders to juſtice, and what had been ordained in theſe two reigns reſpecting witneſſes, particularly in trials of treaſon.

Of bail.

WE have ſeen that the firſt ſtatute which empowered juſtices of the peace out of ſeſſions to let to bail, was the ſta-

ſtatute of Richard III. * This was intended in relief of the ſubject againſt malicious impriſonment upon ſlight accuſations; but as this authority was entruſted only to one juſtice, it was thought proper by ſtat. 3 Hen. VII. c. 3. to repeal this act, and give the ſame juriſdiction to *two at leaſt*, one to be of the *quorum*, who were to bail perſons mainpernable by law till the ſeſſions or gaol-delivery, and to certify thither ſuch bail, under the penalty of 10l. However, the reſtrictions of this ſtatute had been diſregarded, and the authority to let perſons to bail had been abuſed. For tho' the act requires two juſtices at leaſt to diſcharge this office, it became uſual for one to take the bail, and inſert the name of a brother juſtice, who was ſeldom preſent. By this practice, the buſineſs was conducted neither with the ſolemnity nor caution which was required; and it often happened that perſons not properly bailable were let to bail, under pretence that the charge amounted only to ſuſpicion. To remedy the former inconveniences, ſeveral proviſions were made by ſtat. 1 and 2 Ph. and Ma. c. 13. Firſt, as to the queſtion of bail, who are and who are not intitled to that indulgence, it ordains, that ſtat.[k] Weſtm. 1. c. 15. ſhall in future be the law of bail and mainprize. Secondly, that what paſſes before the juſtices may be known and examinable afterwards, it directs, that when any one is brought before them on a charge of manſlaughter or felony, or ſuſpicion thereof, they ſhall take the information of thoſe who make the charge againſt the party, in writing; and ſhall alſo take the examination of the party accuſed; which is the firſt authority given by our law to examine a man as to his own criminality; it being generally held, that *nemo tenetur prodere ſeipſum*. Theſe examinations are to be certified to the next gaol-delivery. The two juſtices are required to be preſent at this bailment, which is to be certified alſo to the gaol-delivery;

* Vid. ant. 128. [k] Vid. ant. vol. II, 131.

but

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

but one only may take the examination, and not till then can the accuſed be admitted to bail.

In like manner all coroners are directed to put into writing the material evidence given upon the inqueſt: and both they and juſtices of the peace are empowered to bind witneſſes by recognizance to give evidence on the indictment; and ſuch bonds and inquiſitions are to be certified in like manner as the examination and bailment. In default of this, the coroners and juſtices are liable to be fined by the juſtices of gaol-delivery.

As theſe proviſions concerning examinations were by the above ſtatute ordained only in caſes where the party was let to bail, it is enacted by ſtat. 2 and 3 Phil. and Mar. c. 10. that they ſhall be taken where the perſon accuſed is committed to cuſtody. It is to be obſerved, that the county of Middleſex and city of London are not within ſtat. 1 and 2 Phil. and Mar. c. 13.

Of witneſſes in treaſon.

We ſhall now ſpeak of the three ſtatutes of Edward VI. and queen Mary, concerning witneſſes in caſes of treaſon; the fate of which ſtatutes has been very ſingular; being diſregarded while in force, and even ſuppoſed to be repealed; till having long lain dormant, they were, upon further conſideration, held to be in force; again eſteemed as repealed; and at length regularly obſerved, and looked upon as a part of our criminal law. During theſe reverſes, they were conſidered in various lights, and underwent very different conſtructions. To underſtand, therefore, the operation theſe ſtatutes have been held to have on one another, it will be neceſſary to look beyond the preſent reigns, to thoſe times when this point was more fully debated.

It is the opinion of lord *Coke*, though perhaps not well-founded, that two witneſſes were required on a trial of high-treaſon at common law. Whether this ſuppoſed rule had been violated in ſome recent inſtances, and a confirmation of it by parliament was thought expedient; or,

as

as others think, and history proves, one witness (or no witness[l]) had been held sufficient to prove this, as it was to prove any other crime; whatever might be the occasion, it was ordained by stat. 1 Ed. VI. c. 12. and by stat. 5 and 6 Ed. VI. c. 11. that no person shall be indicted, arraigned, condemned, convicted, or attainted for any treason, petit-treason, or misprision of treason, unless he be thereof accused by two sufficient and lawful witnesses, as the first statute says, or two lawful accusors, as the latter expresses it: to which it is added by the latter statute, that they shall, upon the arraignment, if living, be brought in person before the accused, to avow and maintain what they have to say. After these two statutes, the stat. 1 and 2 Phil. and Mar. c. 10. enacts generally, that all *trials* for treason shall be had and used only according to the due order and course of the common law of this realm, and not otherwise. The question which has arisen upon this statute is, what operation it has upon those two statutes of Edward VI. The opinions upon this question have been various at different times.

We find, very soon after the statute had been passed, namely, in [m] 2 and 3 Phil. and Mar. and more solemnly in the fourth year, the judges came to a resolution, that the statute of Edward VI. was repealed by that of Philip and Mary. But they considered this repeal as partial, and founded a distinction upon the particular wording of the last act. The statutes of Edward VI. requiring two witnesses to indict, arraign, convict, and attaint; the statute of Philip and Mary declaring, that all *trials* for treason shall be according to the due order and course of the common law; they inferred, that, at least upon the *trial*, there was no longer need of two witnesses. The practice of the courts seems to have been established in pursuance of this opinion gi-

[l] Because a fact was tried by jurors, and not by witnesses. Vid. ant. vol. II. 268, 269. and Plowd. 15.

[m] Dyer, 132.

ven

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ven by all the judges; for in all the ſtate trials during the ſubſequent reigns, the ſtatutes of Edward VI. are either forgotten; or, when any argument is attempted to be grounded on them, they are pronounced by the judges as repealed, and no longer in force.

In the reign of Charles I. we find that lord *Coke*, in a work publiſhed after his death [n], expreſſes himſelf of opinion that the ſtatutes of Edward VI. are ſtill in force. *Sir Matthew Hale* has given divers contradictory opinions upon this point. In his Summary, he is clear that two witneſſes are neceſſary on the *trial*, notwithſtanding the ſtatute of Philip and Mary [o]. In his Pleas of the Crown he poſitively ſays, that two witneſſes are required upon the indictment only, and not upon the trial [p]. In another place he reprobates the diſtinction between the indictment and trial, looking on the indictment as an inſeparable incident to the trial, and in truth a part of it [q]. However, in the ſame paſſage, he ſpeaks very doubtfully as to the main queſtion; though a little further on [r] he ſpeaks of two witneſſes being required by the ſtatute to be examined face to face in caſes of treaſon; which muſt be meant of ſtat. 5 and 6 Ed. VI. Thus did this great lawyer differ from himſelf upon this point.

We ſhall now conſider the opinion of lord Coke; which, being more deciſive than that of the former writer, and being that which has been adopted by *ſir Michael Foſter*, may be conſidered as cloſing this queſtion. After diſcuſſing ſuch points as had been made on theſe ſtatutes by thoſe who went before him, he proceeds to give what he calls his own opinion, upon due conſideration of the matter [s]. He thinks that the ſtat. 1 and 2 Phil. and Mar. does not repeal the ſtat. 1 Ed. VI. and ſtat. 5 and 6 Ed. VI. For that ſtatute, ſays he, extends only to

[n] 3 Inſt. 24, &c.
[o] 262.
[p] 2 H. P. C. 286.
[q] 1 H. P. C. 298 to 300.
[r] Ibid. 306.
[s] 3 Inſt. 26.

trials

trials by verdict; whereas the indictment is no part of the trial, but an information or declaration for the king: *the evidence of witneſſes to the jury is no part of the trial*; for by law, *the trial in that caſe is not by witneſſes, but by the verdict of twelve men*; and ſo there is a manifeſt diverſity between the *evidence to a jury*, and a *trial by jury*. When the ſtatute ſpeaks of *trials awarded*, that expreſſion, he ſays, proves that it had in view the *venire facias* for trial; for neither the indictment nor the evidence can be ſaid to be *awarded*[t]. Thus far our author has explained himſelf upon this doubt, in a manner that may be thought extremely technical and refined; but he ſeems to lay ſome ſtreſs upon it, and to be perfectly ſatisfied that he is right.

UPON this idea our author goes on, and is of opinion that this ſtatute of Philip and Mary had a very different object from that which had till then been generally ſuppoſed[u]. He thinks it was intended to abrogate all acts of parliament preſcribing a different method of trial from that according to the due order and courſe of the common law. Many proviſions introducing new trials had been made in the reign of Henry VIII. and ſurely never was there a period in our law, when a reformation of this kind was more wanted; that the common law might, in this inſtance, be brought back to its firſt principles.

To give ſome inſtances of theſe innovations in the courſe of the common law; it had been ordained by ſtat. 23 Hen. VIII. c. 4. that treaſons in Wales, and where the king's writ runneth not, ſhould be tried by ſpecial commiſſion in ſuch ſhires as the king ſhould appoint. By ſtat. 33 Hen. VIII. c. 20. perſons confeſſing treaſon and afterwards becoming lunatic, might notwithſtanding be proceeded againſt in their abſence, and a verdict and judgment gi-

[t] 3 Inſt. 27.

[u] This conſtruction of the ſtatute was, however, glanced at by the court in 2 and 3 Phil. and Mar. where they held the ſtatutes of Ed. VI. to be repealed. Dyer, 136.

ven, on which execution might be ordered. By ſtat. 33 Hen. VIII. c. 23. perſons charged with treaſon, or miſpriſion thereof, being examined by three of the council, and vehemently ſuſpected by them, might be tried by ſpecial commiſſion in any county: by this act, too, the peremptory challenge of thirty-five, in caſes of treaſon and miſpriſion of treaſon, was taken away. By ſtat. 28 Ed. III. c. 13. a trial *de medietate* was allowed in treaſon.

ALL theſe acts (and there are ſeveral others) introduced a manner of trial derogatory to the due order and courſe of the common law; he therefore conſiders *them* as repealed by the ſtat. 1 and 2 Ph. and Mar. c. 10. and the regular and ancient order of proceeding reſtored [w].

As to the two ſtatutes of Henry VIII. reſpecting treaſon out of the realm, and piracy, there is no particular obſervation made by our author in this place; but in other parts of the ſame work, he ſpeaks of them as ſtill in force. Probably he thought, conſiſtently with former judgments, that as theſe ſtatutes extended the mode of trial according to the order and courſe of the common law, in the room of a proceeding by the civil law, it would have been inconſiſtent with the explanation above given, to have ſuppoſed theſe proviſions repealed, which ſo far tended to effect the deſign aſcribed to the ſtatute of Philip and Mary. It was accordingly, in 2 and 3 Phil and Mar. agreed that theſe ſtatutes, for that reaſon, were not repealed by the act in queſtion [x].

THIS opinion of lord Coke is adopted by ſir Michael Foſter, who has added his own thoughts upon the queſtion. He thinks the legiſlature plainly indicated their opinion concerning the object of the ſtat. Ph. and Mar. when by another clauſe of it they enact, that in all caſes of high-treaſon concerning coin current within the realm, or for

[w] 3 Inſt. 26, 27. [x] Dyer, 131. 75.

counter-

counterfeiting the king or queen's ſignet, privy ſeal, great ſeal, or ſign manual, ſuch manner of trial, and none other, ſhall be obſerved and kept, as heretofore hath been uſed by the common law of the realm, any law, ſtatute, or other thing to the contrary notwithſtanding: for, if the former clauſe had been intended by the legiſlature to take away the neceſſity of two witneſſes in *all* treaſons, why ſhould they have added this to take it away in *ſome?* It would have been uſeleſs and nugatory; whereas it moſt certainly was meant to effectuate ſomething which was not within the former part of the act. He thinks this is made very clear by the eleventh chapter of the ſame ſtatute, which enacts, that in caſes concerning the coin therein enumerated, offenders ſhall be indicted, tried, convicted, or attainted, by *ſuch like evidence*, and in ſuch manner and form as hath been uſed and accuſtomed within this realm, at any time *before the firſt year* of our late ſovereign lord king Edward VI. by which clauſe the matter of evidence is extended as well to the trial as the indictment; and the time ſeems to be pointed out when two witneſſes firſt became neceſſary [y].

THUS, though not by the common law, yet by ſtat. 1 Ed. VI. c. 12. two witneſſes are required both on the indictment and trial for high-treaſon, petit-treaſon, and miſpriſion of treaſon; and by ſtat. 5 and 6 Ed. VI. c. 11. they are to be brought face to face with the priſoner.

IN addition to what has been ſaid reſpecting this famous ſtatute 1 and 2 Phil. and Mar. c. 10. it ſhould be remarked, that after the clauſe ordaining all trials to be had according to the common laws of the realm, there is another which provides for the trial of treaſons *made by that act*, much in the manner and terms uſed by ſtat. 5 and 6 Ed. VI. c. 11.; for it ordains, that upon the arraignment for any treaſon mentioned in this act, all perſons

[y] Foſt. 239.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

(or two of them at the leaſt) who ſhall write, declare, confeſs, or depoſe any thing againſt the perſon arraigned, ſhall, if living and within the realm, be brought forth in perſon before the party arraigned, *if he require the ſame*, and object and ſay openly in his hearing what they can againſt him, concerning the treaſons in the indictment.

In ſupport of lord Coke's opinion, it may be remarked, that the very words of the ſtatute of Philip and Mary upon which this queſtion aroſe, are uſed in ſtat. 13 El. c. 1. in a manner which plainly demonſtrates them to have been then underſtood as he ſuggeſts. That act ſpeaks of perſons attainted *according to the uſual order and courſe of the common laws of this realm*, OR *according to the act made in* 30 *Hen. VIII. intitled, an act concerning the trial of treaſons committed out of the king's dominions.* This ſeems like a clear parliamentary expoſition of the words, and to be in itſelf concluſive, that they were intended to mark the common-law trial, in contradiſtinction to that and other new ones ordained in the time of Henry VIII.

Upon theſe ſtatutes ariſes an obſervation, which none of the above writers have made, but which ſhould be taken into conſideration, in order to underſtand this point fully. In the preceding part of this hiſtory it has been remarked, that the office of the grand inqueſt was to preſent offenders on their own knowledge, and that it often happened for a perſon to be indicted without any one appearing as proſecutor, or accuſor. When it afterwards became the cuſtom to hear the informations of others, and upon this ground to find the indictment; it was a rule of evidence that the accuſor, as he was called, who had preferred the charge to the grand inqueſt, ſhould not be a witneſs to prove the fact in court; becauſe[z] he might be ſuppoſed to be in the ſame mind he was in

[z] Vid. ant. vol. III. 136.

when

when he delivered his information; and inſtead of a confirmation and corroboration, as there ought to be, he could only give the jury a repetition of what he had before ſaid.

A PRACTICE like this can only be explained by recurring to the original of the trial by petty-jury. We have ſeen that the petty-jury were originally brought as *witneſſes*, to declare on their oath their opinion as to the guilt or innocence of the party charged by the indictment. It was therefore above all things expedient, that no perſon who either had been of the former jury, or had appeared before them as proſecutor of the indictment, ſhould be allowed to join himſelf to thoſe who were to try the propriety of *his* act. It was, accordingly, a rule eſtabliſhed in the reign of Edward I. that no indictor ſhould be on the petty-jury *. In proceſs of time, the petty-jury uſed to take occaſionally other helps than their own knowledge: they uſed to read depoſitions of abſent perſons, and ſometimes hear witneſſes; but as theſe papers or perſons were called in merely as aſſiſtants to them, and the trial was ſtill conſidered as preſerving the character of the old proceeding unaltered by this innovation, it was nothing more than reaſonable that the ancient rule ſhould be ſtill adhered to: and that as thoſe who had preferred the indictment could not be of the petty-jury; ſo now they ſhould not, in the light of *witneſſes*, aſſiſt in informing that jury.

THIS ſeems to have continued invariably the practice for many years. We have already ſeen that it was enacted by ſtat. 25 Ed. III. ſt. 5. c. 3. [a] that none of the indictors ſhall be put in the inqueſt upon the deliverance; which *indictors*, in the old writers, it ſhould ſeem, meant as well the proſecutor as the grand inqueſt. There are many inſtances, in the ſubſequent period, of witneſſes challenged becauſe they were indictors [b]. In the reign of Edward IV. the rule was recogniſed in caſes

* Vid. ant. vol. II. 268.
[a] Vid. ant. vol. II. 459.
[b] Bro. Chal. 101, 142, 12 and 40 Aſſ.

of

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

of felony; though it was ſaid not to hold in miſdemeanors, contrary to the opinion in the time of Edward III. [c]. It appears that this rule was ſtill preſerved at the time of the ſtatute in queſtion; for in the 4th and 5th of Phil. and Mar. it was agreed, amongſt other things, by all the judges, that it was a good challenge to a witneſs to ſay, he was one of the accuſors; that is, one of thoſe who were witneſſes on the indictment: for, ſays the book, accuſors and witneſſes ſo far differ, that the former offer themſelves voluntarily, but the latter do not come till they are called; and therefore an accuſor ſeems hardly unbiaſſed [d].

THIS being the prevailing opinion, it is beyond a doubt, that a new regulation reſpecting evidence was made by the ſtatutes of Edward VI. independent of the *number* of witneſſes. The very ſtile of ſtat. 5 and 6 Ed. VI. c. 11. ſeems to intimate, that the bringing before the court the accuſors who had been examined before the grand jury, was ſomething new. For it enacts, with ſome earneſtneſs and preciſion, that "the ſaid accuſors at the time of the arraignment of the party accuſed, if they be then living, *ſhall be brought in perſon before the party* ſo accuſed, *and avow and maintain* that they have to ſay againſt the ſaid party, to prove him guilty of the treaſons contained in the bill of indictment laid againſt the party arraigned; unleſs the ſaid party arraigned ſhall willingly, without violence, confeſs the ſame." If we can rely upon a cotemporary expoſition of theſe ſtatutes of Edward VI. and Philip and Mary, this was the opinion held by the learned of thoſe days. For at a meeting of the judges, to which we have before alluded, in the fourth year of Philip and Mary, they came to the following reſolutions amongſt others: that as the repealing ſtatute enacts all *trials* for treaſon to be ac-

[c] 7 Ed. IV. Bro. Chal. 166. [d] Bro. Cor. 220.

cording

cording to the order of the common law, and not otherwise; and as a common-law trial is by a *jury and witneſſes, and not by accuſors*; therefore, upon *trial* of any treaſon under ſtat. 25 Ed. III. there needed *no accuſors*; that is, the witneſſes to the grand jury were not to be called on the trial, and brought face to face to the priſoner, according to ſtat. 5 and 6 Ed. VI. though accuſors ſtill expected to be at the finding of the indictment [e].

As to the number of witneſſes, we find, that before the repealing ſtatute, and while the ſtatutes of Edward VI. were unqueſtionably in force, the effects of theſe proviſions had been baffled by ſome ſingular explanations. It was reſolved in the 1ſt of Mary, that if a perſon knew the fact of his own knowledge, and told it to another, that other perſon would make a good ſecond witneſs, under the ſtatute of Edward VI.; and in the like manner, he who heard it at ſecond or third hand [f]. When ſuch ſtrained interpretations were adopted to get rid of the check put on ſtate-proſecutions, while thoſe beneficial laws were in force, we cannot wonder that they ſo readily availed themſelves of this ſtatute of Philip and Mary, and pronounced it a repeal in that reſpect of the ſtatutes of Edward VI.

When this point was ſo ſettled, and trials were conducted in purſuance of it, every thing fell back into its old ſtate. Theſe two ſtatutes were the only proviſions which had ever been made as to evidence, either defining the quality or number of perſons whoſe teſtimony ſhould be neceſſary to prove a fact; and when they were looked on as repealed, we need only turn back to former periods to judge what ſecurity was left for perſons labouring under the weight of a proſecution for treaſon. Trials for treaſon at common law, notwithſtanding the boaſted ſecurity of juries, were a certain mode of deſtroying a man. Juries ſeem to have ſurrendered to the court their right of judging and deter-

[e] Bro. Cor. 220. [f] Dyer, 99. b.

mining.

mining. They uſed to convict without a ſingle witneſs, only upon depoſitions; thoſe ſometimes not ſigned by the party making them, and the contents amounting to nothing but hearſay. They might by law, and they often did in fact, convict upon the arraignment, without any thing like proof. This was a ſerious matter in caſes of treaſon, where paſſion, prejudice, and intereſt, carry men ſo far. The law was the ſame in all caſes of trial by jury, in common felonies and miſdemeanors; but in theſe inſtances, it was not pregnant with ſuch bad conſequences as in the former; there was not uſually that heat in proſecuting; and, in the latter, the judgment did not reach to life.

THE ſtatute of Edward VI. in enacting that the accuſors ſhould appear at the trial, legitimated a teſtimony to which before there lay a legal objection; and this proviſion ſeemed to be equally expedient for the proſecutor and defendant. The proſecutor, on the credit of whoſe teſtimony the bill had been found, gained, by the ſtatute, a right of *avowing and maintaining* what he, moſt likely, was alone, or beſt, able to teſtify. The priſoner, who was thus enabled to croſs-examine the moſt formidable of the witneſſes againſt him, being thoſe on whoſe teſtimony the bill was found, ſo far obtained a great advantage.

HOWEVER, though theſe benefits of the ſtatute were thus for a time defeated, another proviſion reſpecting witneſſes ſeems to have had ſome of thoſe good effects on trials of felonies, which this ſtatute was intended to produce in trials of treaſon. The ſtat. 1 and 2 Ph. and Ma. c. 13. directs juſtices of the peace to bind by recogniſance all perſons who declare any thing material reſpecting any felony, to appear at the next gaol-delivery, and to give evidence againſt the party ſo indicted *at the time of his trial*; and, as it is more fully expreſſed in ſtat. 2 and 3 Ph. and Ma. c. 10. *to give evidence againſt the party*. Theſe ſtatutes, by providing a compulſory method of obliging perſons to give evidence againſt the party at the gaol-delivery, that is, both

both on the indictment and on the trial, took away the challenge to accusors, and gave the prisoner that candid and open trial so much to be wished. If we may venture a conjecture, it is, most probably, from the time of these two statutes that we are to date the disuse of this challenge to an accusor. This challenge was supported upon the principle, that an accusor was a volunteer, and sort of party, and therefore not entitled to that credit which an indifferent witness enjoyed, who appeared and delivered his evidence under the compulsion of legal process. An accusor was now compelled to give evidence equally with a witness, and stood thereof in the same legal situation [g]. When persons were bound in the same manner to give evidence in cases of treason, there was no reason why the like analogy should not operate with respect to them; and that the evidence of an accusor should in that case be in the like manner legal and valid. This probably soon became the law and practice; for in the time of queen Elizabeth, the distinction between an accusor and a witness seemed quite forgotten. A vestige however of this old law seems still to remain in the practice of endorsing on the indictment the names of witnesses examined before the grand jury: this, as has been before observed, might originally be intended to shew the court who were the *accusors*, and on that account were to be challenged, if attempted to be produced as *witnesses* [h].

After all, notwithstanding the repeal of the statutes of Edward VI. and the many instances which followed in the subsequent reigns of partial and oppressive proceedings

[g] In the ecclesiastical court, all voluntary preferrers in the office were considered as parties. These stood precisely in the situation of persons giving information to a grand inquest, and it was from this idea of canonical jurisprudence that the challenge to accusors was adopted [‡]. Some little confusion may arise from the term, because *accusation* is a mode of ecclesiastical prosecution contradistinguished from those by *inquisition* and *denunciation*, upon which two last the office always proceeded. Vid. ant. 36, &c.

[‡] An Apol. for Eccles. Proc. part. II. 88.

[h] Vid. ant. vol. III. 136.

on

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

on trials, the reigns of Edward VI. and queen Mary conſtitute a period when a jury firſt began to be a fair and effective tribunal, aſſuming the right of judging for itſelf; and when perſons whoſe fate was to be determined by their verdict, repoſed a full confidence in their uprightneſs, independence, and integrity. There is an inſtance in the reign of Philip and Mary, where a jury perſiſted in acquitting a † ſtate priſoner, againſt the direction of the court, and, it was well known, againſt the wiſhes of the ſovereign. Whatever judges might pronounce reſpecting the exiſting law, it never went from the memory of priſoners, that a ſtatute had once expreſsly declared, there ſhould be two witneſſes to prove a treaſon, and that they ſhould be called face to face. As to trials of felony, it was an expreſs recommendation of queen Mary, at the beginning of her reign, to her judges, that they ſhould ſuffer priſoners to call witneſſes for their defence.

THE defence of priſoners, in alll criminal proſecutions, ſeemed to depend on the like indulgence, and not upon any right to call witneſſes; for in ſtat. 1 Ed. VI. c. 1. ſect. 6. where a proceeding by indictment before juſtices of the peace in ſeſſions is directed, it was thought neceſſary to ordain, that the party arraigned *ſhall be admitted* to purge or try his innocence by as many, or more witneſſes, and of as good honeſty and credence, as the witneſſes which depoſed againſt him.

THUS many circumſtances contributed actually to render this mode of trial a more deliberate and complete examination of a matter of criminality than it had ever been before. While enlarged notions reſpecting the power and importance of this inſtitution began to prevail, it was more and more conſidered as independent in ſome degree of the court, and as having an authority and judicature of its own; the progreſs of which opinions will be ſeen in the ſequel.

† Sir Nicholas Throckmorton.

CHAP.

CHAP. XXXII.

EDWARD VI.

PHILIP and MARY.

Aſſignees of Reverſions—Conditions and Limitations—Of Feoffees to an Uſe.—Covenants to raiſe uſes—Origin of Truſts—Whether Remitter by an Uſe—What Jointures will bar Dower—Aſſumpſit againſt Executors—Witneſſes in Treaſon—Diſtinction between Murder and Manſlaughter—Burglary to be by Night—Trial of Principal and Acceſſary—Reformation of the Eccleſiaſtical Law—Of Marriage—Of Wills—King and Government—New Commiſſions—Trial of the Duke of Somerſet—Of Sir Nicholas Throckmorton—Bills of Attainder—Judicial Proceedings on account of Religion—Staunforde—Printing of Law-Books—Miſcellaneous Facts.

THE new points of learning that had lately engaged the attention of the courts received an acceſſion from the ſtatutes of the laſt reign. Theſe, whether they related to property or to crimes, furniſhed freſh objects of litigation, and new topics of argument, and drew from the judge ſeveral deciſions of importance during theſe two ſhort reigns.

MANY queſtions aroſe upon leaſes granted by religious corporations. Theſe bodies, having ſeen the deſtruction of ſome of their brother ſocieties, were reſolved to make the moſt of their property while they had it; and therefore granted long leaſes to their friends, and their former leſſees. The ſtat. 31 Hen. VIII. c. 13. for the diſſolution of

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

of monaſteries, amongſt other regulations on this head, had declared all leaſes void, if made within a year before the beginning of that parliament; with a proviſo, that where the leſſee was at the time in poſſeſſion under a former leaſe for years, there the ſecond, if made for that time, or more, ſhould be good for twenty-one years. The caſe of *Fulmerſtone* verſus *Steward* aroſe upon this proviſo [i], and many others of the ſame kind were agitated in theſe two reigns; but as the ſubject of them was temporary, they furniſh no enquiry that can engage the curioſity of the modern lawyer.

ANOTHER proviſion, occaſioned by the diſſolution of monaſteries, had a greater and more laſting influence. The ſtat. 31 Hen. VIII. c. 13. abovementioned, had permitted the king to take advantage of all covenants and conditions to which the religious ſocieties had been parties; and which it was convenient ſhould go to the crown along with the reverſions which were given to it by parliament. But this benefit not extending to the king's patentees and grantees, the parliament took it into conſideration, and by ſtat. 32 Hen. VIII. c. 34. gave the ſame power to them: this was thought a good opportunity to correct an old defect in the law, and to include alſo common perſons as well as the king's grantees. It was accordingly permitted to all grantees of reverſions to avail themſelves of covenants made to their grantors; and leſſees in the ſame manner were meant to have a reciprocal claim upon ſuch grantees, as they before had on their leſſor. But this was done in ſuch an obſcure way, that it was difficult to ſay, whether the whole benefit of the act was not confined to grantees of the king, and of abbey-lands. This doubtful wording of the act gave occaſion to the caſe of *Hill* verſus *Grange*, where this matter was fully canvaſſed,

Aſſignees of reverſions.

[i] 1 and 2 Ph. and Ma. Plowd. 108.

and

and it was reſolved by all the judges of the common-pleas, that the act extended to all grantees of reverſions; a conſtruction which it has borne ever ſince.

THE rules that had been long laid down, and adhered to for the government of limitations in remainder, had not ſo preciſely defined the boundaries of theſe eſtates, but that on ſome occaſions arguments were found to diſpute their authority, or at leaſt to weaken their operation by endleſs diſtinctions. This may be ſeen by the diſcuſſion which was raiſed in *Colthirſt* verſus *Bejuſhin*, where a limitation that ſeemed to be well ſupported by the example of former times, was conteſted with ſome ſhew of reaſon and law. It was a leaſe from a religious houſe to a man and his wife for their lives, remainder to *A.* their ſon for his life; and if he died during the life of the huſband and wife, then remainder to *B.* another of the ſons for life, *ſi ipſe vellet inhabitare, &c.* which was a common condition in the leaſes of eccleſiaſtical perſons, who in this manner provided not only for keeping their poſſeſſions in tenantable order, but likewiſe bound their tenants to perform a duty which was incumbent upon churchmen in all inſtances, namely, to preſerve ſome appearance of that hoſpitality which was one principal conſideration of gifts in mortmain.

THE objections raiſed to this remainder to *B.* were theſe. It was ſaid, that a remainder could not commence on condition; becauſe, if ſo, it would not paſs at the firſt livery, which was required in every remainder. Again, it was incompatible with the preceding eſtate; for if it was to commence *then*, namely when the eldeſt ſon died before the huſband and wife, it muſt, in taking effect itſelf, deſtroy the particular eſtate; which was a repugnancy and contrariety that the law would not ſuffer. Theſe ſeem to be the chief points relied on, and theſe were ſuppoſed to be ſanctioned by the authority of adjudged caſes. But all the judges

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

judges of the common-pleas were clear that this was a good remainder.

THEY ſaid, this remainder was perfectly agreeable with the principles of law already eſtabliſhed: they denied, firſt, that a remainder ought to paſs out of the leſſor preſently; for if I make a leaſe for years remainder for life, upon condition that if he in remainder do not ſuch an act, the remainder ſhall be void; here before the condition broken, the remainder is good; but when the condition is broken, the remainder is out of him, and paſſes again to the leſſor; which proves that a freehold may, by agreement at the time of the livery, paſs from one to another by matter *ex poſt facto*. Thus, if a leaſe for life is granted with remainder to the king, and livery of ſeiſin is made, the remainder does not paſs till the deed is inrolled. In *Pleſſington's caſe*, in the time of Richard II. [k], where one condition was, that if the leſſor died within the term, the leſſee for years ſhould have the land for life, the condition was held good. So in the preſent caſe, the remainder to *B.* did not paſs out of the leſſor till *A.* was dead, and then it paſſed by virtue of the original words annexed to the livery. But it was not to take effect till after the death of the huſband and wife, for that is the plain and obvious ſenſe of "then;" and they agreed, that if it was to be conſtrued in the ſenſe given by the counſel, the remainder ſhould be void.

Conditions and limitations.

IT was ſaid by *Hinde*, juſtice, that this remainder did not depend upon a *condition*, as had been argued, but on a *limitation*; for the words to make a condition are ſuch as reſtrain the thing given; as upon condition that he ſhall not do ſuch an act: but here the words only *limit* the time when the remainder ſhall commence, and no ways reſtrain the thing. The common caſe of an eſtate tail is, that if the donee die without iſſue, it ſhall remain to a ſtranger; which is not a condition, but a limitation. *The*

[k] 6 Rich. II. Fitz. Quid juris 20.

chief-

chief-juſtice Montague agreed with him entirely in this idea; and added, that whether it was called a *condition* or *limitation*, yet he thought the remainder good; for the lawful owner of land, he contended, might give it to what perſon, at what time, and in what manner he pleaſed, ſo as it was not repugnant to law; and this in queſtion he thought perfectly agreeable to ancient and modern precedents. Of the former kind, he quoted one of thoſe common caſes in the reign of Edward III. where, for the aſſurance of a leſſee for years, it was uſual to make a charter of feoffment on condition that if the leſſee was diſturbed in his term, he ſhould have the fee. And he called to their mind a caſe which was mentioned in the reign of Henry VIII. of a fine to paſs lands in tail, with condition to bear the conuſor's ſtandard; and on failure, that the land ſhould remain to a ſtranger [l]. He ſaid, he was counſel in that caſe; and though *Fitzherbert* expreſſed ſurprize at a fine being levied on condition, yet the remainder was not conſidered as any thing remarkable. He was of opinion, that the remainder in the preſent caſe did paſs out of the leſſor at the time of the livery, although it did not veſt in *B.* till the death of *A.*; and he held it in abeyance until the performance of the condition, upon the poſſibility that it might be performed. Thus if land was given to a married man and to a married woman, and the heirs of their two bodies, the fee tail paſſed out of the do nor immediately by reaſon of the poſſibility that they might marry; and in the mean time the inheritance was in abeyance. In the ſame manner, he ſaid, the remainder here was in abeyance, till the event, on which it was limited, had happened.

Upon ſuch reaſons, the judges agreed in holding this to be a good remainder [m]. The arguments and adjudication on this occaſion tended to ſet in a better light the learning of remainders depending on a contingency; and the di-

[l] Vid. ant. 336. [m] 4 Ed. VI. Plowd. 23.

ſtinction

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

ſtinction between a condition and a limitation afforded a new idea, which was afterwards made great uſe of, in the conſtruction of reſtrictive clauſes in deeds and deviſes of land.

WHATEVER doubts might be entertained on conditions that were deſigned by the parties to operate in deſtruction of eſtates, there was one condition created by the legiſlature, which infallibly annihilated an eſtate whether for life or entail, and gave a right of entry to the perſon next intitled in remainder or reverſion. This was the alienation of a woman who had an eſtate from her huſband, which by ſtat. 11 Hen. VII. induced a forfeiture. A caſe came before the court of common-pleas in 4 Ed. VI. which gave occaſion to this ſtatute being fully examined and explained; and as it contains ſome argument upon the new learning of uſes, it is on that account deſerving of notice. This was *Wimbiſh* verſus *Talbois*, where a feoffment had been made by ſir George Talbois to the uſe of himſelf and in ſpecial tail; after which came ſtat. 27 Hen. VIII. They had iſſue Thomas and William; and then ſir George died. Thomas died, leaving iſſue Elizabeth, who married to Wimbiſh. Afterwards William by covin with his mother lady Talbois, brought a formedon *in deſcendre* againſt her; ſhe appeared at the firſt day, and William recovered by *nient dedire:* upon this Wimbiſh and his wife Elizabeth, as heir to ſir George, entered by virtue of the ſtat. 11 Hen. VII. c. 20.

IT was contended that this entry was not lawful, for ſeveral reaſons. They ſaid, that lady Talbois did not hold ſuch an eſtate as was deſcribed by the act; for, by the firſt branch of the act, ſhe ſhould have an eſtate in dower for life, or in tail jointly with her huſband, or ſolely to herſelf, or to her own uſe in any lands, tenements, or other hereditaments, of the inheritance or purchaſe of her huſband. Now, admitting her to have an eſtate tail jointly with her huſband, they ſaid it was not *in lands*, but only *in uſe:* and thoſe

thoſe were two different things. Again, it was not of the inheritance or purchaſe of the huſband, for the *uſe* was neither, being a new thing, not in being before, and ſo never in the huſband; ſo that ſhe was not within the firſt branch. The ſecond branch ſpeaks of the like eſtates when they came from any anceſtor of the huſband, which was not pretended to be the caſe here. And the third branch is, where the eſtate comes by any perſon ſeiſed to the uſe of the huſband or his anceſtors; and they ſaid, ſhe was not within this branch, for the uſe was appointed by the huſband at the time of the eſtate of the feoffees, therefore ſhe could not claim from them. It was concluded, therefore, that lady Talbois not being within the terms of the act, no forfeiture could enſue. Further, they contended, that admitting ſhe was, yet the heir in her life-time could have no right to enter; for the conſtruction of the two clauſes relating to the forfeiture was, that the recovery in caſe of tenant in tail was merely void, and that the iſſue ſhould enter as if no recovery had been ſuffered, after the death of the tenant, for then, and not till then, had an heir any right or title; and it was only where the woman was tenant in dower, or for life, that the reverſioner, or he in remainder, might enter immediately.

THESE were the points upon which it was endeavoured, ingeniouſly enough, to take this caſe out of the ſtatute; but it was held by the whole court of common-pleas, that this caſe was within the words of the act; and if not, that it was at leaſt within the equity of it, and that the entry was lawful immediately, in the life of the tenant in tail.

As to the firſt point, whether *ceſtui que uſe* was within the act; it was admitted by *Hales*, juſtice, that an eſtate in uſe is mentioned but once in the premiſes of the ſtatute, *ſolely to herſelf or to her own uſe*; but if that clauſe ſpeaks only of *ceſtui que uſe*, and what follows relative to recoveries had againſt women, *or any ſeiſed to their uſe*, is only

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

to be referred to that, it could not be denied but the present case was clearly within the words of the statute. It is to be observed, says he, that this act was made within fifteen years after stat. 1 Rich. III. which makes the acts of *cestui que use* binding on his feoffees; and perhaps some of the makers of that statute were also at the making of stat. 11 Hen. VII. and must have considered the effect of the first statute, by which a recovery was good only during the life of tenant in tail: and so, if stat. 11 Hen. VII. did no more than make the recovery void against the issue, it would provide only for that which needed no provision. The statute must be designed to make that unlawful which was lawful before; and as it was meant to have this effect with regard to a tenant in tail in possession, it was equally reasonable, because it was in equal mischief, that it should be construed to have the same effect against *cestui que use* in tail. This latter consideration had always been a reason in our law for extending a statute by equity to such cases as were not within the letter of it. Of this there were many examples. Thus, the stat. Marlb. c. 6. tho' it speaks only of estates for years and feoffments, yet is construed to include a gift for life, or in tail to the issue, for the purpose of defrauding the lord of his ward. The stat. *de donis* speaks only of three estates tail, but has been extended to many others. Stat. Westm. 2. c. 3. which directs him in reversion to be received to defend a suit, has been construed to include those in remainder. An action of account given by statute to executors has been extended to administrators [n]; and many other instances were given of statutes construed by equity. From all this it appeared, that a like grievance should by equity be taken to be within the purview of the act.

In all this the *chief-justice Montague* concurred; and with regard to the words of the act, which required it to be

[n] Plowd. 53.

of

of the inheritance or purchaſe of the huſband, he ſaid, that being ſuch as the heir might inherit, was the true legal idea of an inheritance: and he treated with contempt the diſtinction made between an inheritance and purchaſe, which had been quoted from *Britton*, whoſe book he ſaid contained many errors. For himſelf, he profeſſed to follow Littleton, which he called the trueſt and ſureſt regiſter of the grounds and principles of our law; and Littleton ſays, that not only what a man has by deſcent, but alſo what he has by purchaſe, is an inheritance. Thus, he concludes, the words of the ſtatute are ſatisfied; for ſhe has an eſtate in an hereditament (namely, in a uſe) jointly with her huſband, to her own uſe, of the inheritance of the huſband, which is all required by the firſt disjunctive ſentence of the ſtatute.

But if ſhe was not within that, ſhe was within the ſecond disjunctive ſentence, *or given to the huſband and wife in tail by any perſon ſeiſed to the uſe of the huſband:* for the feoffees being ſeiſed to the uſe of the huſband and wife, were ſeiſed to the uſe of the huſband (the huſband and wife each having the entire uſe, for there are no moieties between them), and the feoffees were the donors of the eſtate, after the execution of the poſſeſſion to the uſe by ſtat. 27 Hen. VIII. for the parliament could not be ſaid to be the donors, the act being only the conveyance of the land from one to another. He ſaid, it had been long ſince held, where *ceſtui que uſe* and his feoffees joined in a feoffment, that it ſhould be conſtrued to be the feoffment of the feoffees; for they had the greateſt authority to give it, even after the ſtat. Rich. III. * So if one who was ſeiſed in fee, and one who had nothing in the land, joined in a feoffment, it ſhall be ſaid to be the feoffment of him who has right, and the confirmation of the other. Thus, he concluded, it ſhould here be ſaid to be the feoffment of the

* M. 21. Hen. VII. 32. pl.

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

feoffees by parliament, and the aſſent and confirmation of all others; and if it was conſtrued otherwiſe, it would be attributing to the ſtatute the power of doing wrong to the feoffees, by taking a thing from them and making another the donor of it. Thus, the feoffees were the donors; but if they were not, yet ſir George was, unleſs it ſhould be thought a repugnancy to ſay he was a donor to himſelf; and therefore the feoffees more properly were the donors, and then the whole of the ſtatute was ſatisfied. However, if this caſe was not within the words, he agreed with the other judges in thinking it within the equity of the ſtatute; and to obviate the objection, that the proviſion being in reſtraint of the tenant in tail ſhould be conſtrued ſtrictly, he ſaid it was for the benefit of the common-weal, and in advancement of juſtice; and every ſtatute which is conſtrued by equity, reſtrains, and is penal to ſomebody; and he ſeemed to think the rule of conſtruction was to turn on the ſtatute being beneficial to the greater number [p].

THOUGH no judgment was here given, it was of great importance that the judges concurred unanimouſly in ſo ſolemn opinion to bring this caſe within the terms of the act; for, ſince moſt eſtates in the kingdom were conveyed to a uſe, this proviſion would otherwiſe have become almoſt wholly abortive. The anxiety they felt to compaſs this by a literal conſtruction, led them into ſome ſubtlety and refinement; and though there can be very little doubt what the makers of this act intended, yet the wording of it being liable to ſome cavil, it ſeemed a ſafe and ſenſible reſolution to ſupply the defects of it by equity.

Of feoffees to a uſe.

IN theſe two reigns ſome deciſions were made on uſes, which tended to ſhew the effect the late ſtatute had upon them. It ſeemed a doubt, when that ſtatute had ordained that *ceſtui que uſe* ſhould thenceforward be ſeiſed of the land and freehold, as he before was of the uſe, whether any

[p] Plowd. 42.

ſeiſin

ſeiſin of the freehold remained in the feoffees. The courts ſeemed inclined to think the feoffees ſtill poſſeſſed of the ſame eſtate and power they had before the act; ſo that both the *ceſtui que uſe* and the feoffee having a freehold, and both having an equal power over the ſame freehold, the difficulties of that ſort, which were experienced after the ſtat. 1 Rich. III. were felt after the ſtat. 27 Hen. VIII.

THE following are ſome inſtances where this point was debated. A man made a feoffment in fee to the uſe of *W.* and his heirs, till *A.* paid 40l. to *W.* and then to the uſe of *A.* and his heirs. *A.* paid to *W.* the 40l. There was a difference of opinion as to the concluſion to be founded on theſe facts. Some ſaid, that if *A.* entered, he would become *ipſo facto* ſeiſed in fee; for *W.* being ſeiſed in fee by the ſtatute of uſes, *A.* would be able to diveſt that fee, and transfer it to himſelf under the condition of the deed. Others, on the contrary, were of opinion, that the payment and entry of *A.* had no effect without an entry by the feoffees. Between theſe two opinions *Brooke* has ſtruck out a middle courſe, as an expedient to ſalve difficulties: he thought that it would be beſt for *A.* to enter in the name of the feoffees, and then, *quâcunque vitâ datâ*, the entry muſt be good, and he would become ſeiſed according to the terms of the deed. To this he added, that a uſe might change from one to another by ſome act or circumſtance, *ex poſt facto*, as well ſince as before the ſtatute [q].

ANOTHER queſtion aroſe reſpecting the intereſt of feoffees, in the caſe of *Stephen Davis*. A tenant for life, and the tenant in tail next in remainder in uſe, had levied a fine of the land, which had afterwards been conveyed to the king; the feoffees to the uſe preſented a petition of right: and here two points were made in arreſt of judgment on the petition. Firſt, that the fee ſimple of the uſe was legally conveyed by the fine, and was now in the king; and

[q] 6 Ed. VI. New Caſes, 136.

if

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

if it was the caſe of a common perſon, he could not enter; becauſe not being ſeiſed of a fee ſimple, as he was before the alienation, of what eſtate could he be in? Secondly, they ſaid that all intereſt and right of the feoffees, which was not to their own uſe, was taken away by the ſtatute. There does not appear to be any deciſion of theſe points at this time[r]; and it will afterwards be ſeen, that all theſe poſitions received ſome qualification.

Covenants to raiſe uſes.

THE rigid opinions maintained in the laſt reign againſt *covenants to convey uſes*, were beginning to be ſomewhat tempered. A queſtion aroſe upon a covenant of this ſort in the reign of Philip and Mary. Sir Thomas Seymour, the lord-admiral, who was attainted in the laſt reign, had covenanted and granted to one Andrew, in conſideration that the ſaid Andrew had conveyed, after his death, divers lands in fee ſimple to the ſaid ſir Thomas, that he would levy a fine to certain perſons of lands whereof the ſaid admiral was then ſeiſed, to himſelf for life, remainder to the ſaid Andrew in tail. No ſuch fine was levied; and it now became a queſtion, whether the covenant of itſelf had changed the uſe. It was debated at Serjeant's-Inn; and it there appeared to *Bromley the chief-juſtice*, *Portman*, *Brown*, *Sanders*, *Brooke chief-baron*, *Whiddon*, *and Griffin* the attorney, and *ſir James Dyer*, that no uſe could be preſently altered by this covenant; for it was future, and the covenant could not now by any poſſibility be performed. But they, in a manner, agreed that if I covenant in conſideration of marriage, or for a ſum of money paid to me, that *A.* ſhould have certain lands, this would change the uſe preſently, becauſe there the eſtate was not to be made afterwards, as in the caſe before the judges. It was alſo agreed, that if *ceſtui que uſe* willed that his feoffees ſhould make an eſtate to *J. S.* in tail or in fee, and then died, yet the uſe would be completely changed before the eſtate was actually executed by the feoffees[s].

[r] 7 Ed. VI. Dyer 88. 109.

[s] 1 Mar. Dyer 96. 41.

THESE

THESE conceſſions were a ſufficient foundation for the ſuperſtructure that was afterwards raiſed upon them. Two years after the following caſe happened: A covenant was made that the ſon of *A.* ſhould marry the daughter of *B.* for which *B.* ſhould give to *A.* an hundred pounds; and *A.* covenanted with *B.* that if the marriage did not take place, then *A.* and his heirs ſhould be ſeiſed of certain lands to the uſe of *B.* and his heirs *quouſque*. *A.* and his heirs or executors repaid the hundred pounds: after this *B.* died, and ſomething happened to prevent the marriage taking effect; ſo that it became a queſtion, whether the uſe was changed by the above covenant. And it was held, that the uſe was executed by the ſtatute in the heir of *B.* notwithſtanding *B.* was dead before the refuſal of the marriage; for the covenant bound the land with the uſe in the life of *B.*[t].

A COVENANT was made upon conſideration of love, favour, and other good conſiderations, to ſuffer a recovery to ſir Anthony Wingfield, to the uſes mentioned in a deed; which uſes were contained in a clauſe, wherein the ſaid ſir Anthony covenanted and granted for himſelf and his heirs, that within eight months after the aſſurance ſo made, he would make, or cauſe to be made, an eſtate to his own mother for life, remainder to himſelf and his wife in ſpecial tail, remainder to his wife in fee. A recovery was ſuffered, but no eſtate made by ſir Anthony; and it became a doubt, whether the uſe was changed by the deed, and the operation of the ſtatute upon it. And it ſeemed to the two chief-juſtices, juſtice *Stamford* and *ſir James Dyer*, that no uſe was changed by the indenture and recovery only, without an eſtate being properly executed; for if ſo, a conſtruction of law would be allowed which might make it impoſſible for the covenantor to perform his covenant; they not only held no uſe to be changed under the ſtatute and the deed, but they alſo added, that no *ſubpœna* would lie to compel

[t] 3 Mar. New Caſes, 137.

ſir

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

ſir Anthony to carry it into execution, *becauſe* there was a remedy at common law by action of covenant [u].

IT was not only in the inſtance of theſe covenants that the courts of common law entertained ſcruples of allowing a uſe to be conveyed, where a plain and obvious intention of the parties to raiſe a uſe was diſcoverable from the tranſaction and terms of the deed; but we have ſeen in the former reign, where it was directed that the feoffees ſhould take the profits and pay them over to another, that the judges held this not to be a uſe executed by the ſtatute in the perſon to whom the profits were to be paid [x]. The judges did not then go ſo far as they did on the preſent occaſion, and declare that no *ſubpœna* would lie. It muſt be confeſſed, that the preſent is not ſo ſtrong a caſe as the former; this being an *executory* covenant, and as ſuch, plainly within the rule which had been laid down upon that head, in the repeated deciſions of this and the former reigns. However, it will be ſeen, notwithſtanding the court of chancery might at this time join with the courts of law, and deny relief in theſe executory covenants, that in after-times perſons were enabled moſt completely to ſubſtantiate theſe claims in equity as *truſts*, which ought in conſcience to be fulfilled.

Origin of truſts.

THE like obſervation may be made on a deciſion in the latter end of Philip and Mary. It was reſolved by the whole court of common-pleas, in the caſe of *Jane Tyrrell*, that a uſe could not be limited on a uſe. *Jane Tyrrell* bargained and ſold land for a ſum of money, *habendum* to the bargainee and his heirs for ever, to the uſe of the bargainor *Jane Tyrrell*, for life, and after her deceaſe to the bargainee in tail, remainder to the uſe of the heirs of the bargainor in fee. It was objected, that the uſes beyond the *habendum* were all void and impertinent; for a uſe could not be reſerved, or raiſed out of a uſe; and by the nature

[u] 4 and 5 Phil. and Mar. Dyer, 162, 40. [x] Vid. ant. 351.

of

of this conveyance, by bargain and ſale, a uſe was firſt transferred to the bargainee, before any freehold or inheritance was veſted in him by the enrollment. The court had before conceived ſome doubt, whether all the uſes beyond the firſt were not mere nullities; and now it was ſo adjudged by *Sanders*, chief-juſtice, and the reſt of the court[x]. Here was another occaſion for the aid of a court of equity to temper the conſtruction of the courts of common law. In this manner, after the making of the ſtatutes of uſes, did the ſtrictneſs of the judges, in conſtruing thoſe conveyances, drive uſes back into the courts of equity. The chancery once more, as in the reign of Henry VI. took up uſes where the common law rejected them; and all ſuch uſes, with moſt or all of their conſequences, became peculiar objects of that court's juriſdiction, under the idea and conſideration of *truſts*; which ought, in conſcience, to be eſtabliſhed and fulfilled, tho' they were not wholly conſonant to the rules and courſe of the common law.

It ſeemed to be in conſequence of the ſtatute of uſes, that the judges agreed to conſider a recovery where a *ceſtui que uſe* in tail was vouchee, to be a ſufficient bar of the iſſue[y]. As the ſtatute had put the *ceſtui que uſe* in complete ſeiſin of the freehold, he was in the condition of other tenants in tail, and entitled to every advantage which a recovery could furniſh for diſpoſing of his eſtate.

Notwithstanding the determination in the reign of Henry VIII. that no remitter was worked by the execution of the poſſeſſion to the uſe[z], this point was brought forward again, and argued in the court of wards, in 1 and 2 Phil. and Mar. in *Townſend*'s caſe. There *ſir Roger Townſend* being ſeiſed in tail in right of his wife, made a feoffment to the uſe of himſelf and his wife for life. Upon the occaſion of one of *Roger*'s deſcendants leaving at

[x] 4 and 5 P. and M. Dyer, 155, 20.
[y] Ed. VI. New Caſes. 137.
[z] Vid. ant. 359, 360.

his

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

his death a minor, an office was found, and amongſt other things, the jury found that the wife was in her remitter. It was argued in ſupport of this verdict, not as in the former caſe, that the remitter was wrought by the ſtatute, but that it was a remitter before the act, and the act ought to be no hindrance to it now. They ſaid there were two clauſes in the ſtatute of uſes; the firſt of which diveſts the eſtate out of the feoffees, and gives it to the *ceſtui que uſe* in the ſame quantity the feoffees had it; the other veſts it in ſuch quality as *ceſtui que uſe* had the uſe. So that notwithſtanding the ſtatute put the eſtate in the wife according to the quantity and quality of the uſe, yet when it came to the wife, they ſaid, the poſſeſſion was afterwards changed by reaſon of her former right: for though the ſtatute gives the ſeiſin in the ſame quality as the uſe, it does not ſay it ſhall continue ſo; the ſtatute relating only to the firſt conveyance, not to the continuance of the uſe. For ſuppoſing the wife had been infeoffed, the poſſeſſion would have paſſed by the feoffment, and the remitter come afterwards; ſo here the poſſeſſion is given by the ſtatute, and then comes the remitter; for they repeated that the execution of the uſe ought not to hinder the remitter.

Whether remitter by a uſe.

But it was underſtood in a different manner by the other ſide, and was accordingly ſo decreed by the court of wards. They ſaid that the feoffment made by the huſband in 29 Hen. VIII. was a diſcontinuance to the wife, for the purging whereof ſhe was driven to her *cui in vitâ*, and could not avoid it by entry, as ſhe might ſince ſtat. 32 Hen. VIII. c. 28 *. And when ſhe had an action given her to recontinue the poſſeſſion, which ſhe waived, and came to the poſſeſſion by other means, ſhe ought to take it with ſuch appendages as the law limits to thoſe means, and no otherwiſe: the means by which ſhe came to that poſſeſſion, which her huſband had taken from her, was the ſtatute of uſes; and in whatſoever manner the ſtatute gives her the poſſeſſion, ſo it ought to be adjudged to her, notwithſtand-

* Vid. art. 233.

ing

ing ſhe is a feme covert; for neither coverture nor infancy are excepted in the ſtatute. Now the eſtate limited in uſe to the wife was only for life jointly with her huſband; and as by the ſtatute ſhe could only be in ſuch ſeiſin of the land as ſhe was of the uſe, therefore ſhe could not be ſeiſed in tail. Again, the clauſe of the ſtatute which limits the ſeiſin to be according to the *quality, manner, and form* of the *uſe*, will not ſuffer the wife to be remitted; for ſhe had the uſe of a new *purchaſe*; therefore ſhe muſt have the land as a purchaſer. But if ſhe was adjudged in her remitter, ſhe would be adjudged in by deſcent, which would be contrary to the ſtatute: and the affirmative words of the ſtatute muſt, as in all acts, be conſtrued to imply a negative; namely, that the eſtate can take effect in no other poſſible manner.

THEY held, that if the firſt poſſeſſion did not work a remitter, there never ſhould be any, where the entry of the party was taken away. But they ſtated this difference: if a diſſeiſor made a feoffment in fee to the uſe of the diſſeiſee, and afterwards the diſſeiſee entered, there he ſhall be remitted by his entry, though before his entry he was not, but was in poſſeſſion only by virtue of the ſtatute; and when he enters he is adjudged in, not in reſpect of the ſtatute, but in reſpect of the diſſeiſin. But in the preſent caſe, the entry was taken away by the diſcontinuance; ſo that if the firſt eſtate did not remit her, her entry or continuance afterwards could not. They reminded them, that when the ſtatute of uſes paſſed, there were many *ceſtui que uſe* in fee, who had a right of eſtate tail; and when the poſſeſſion was conveyed to them by the ſtatute, it was the opinion of all the judges that they were not thereby remitted[a].

THUS it was held very early after the ſtatute, that execution of the poſſeſſion to the uſe did not work a remitter.

[a] Vid. ant. 521.

The

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

The counſel in the preſent caſe ſeemed to be aware of this; and, not venturing now, as in the reign of Henry VIII. to argue the contrary, they were content to admit ſuch adjudication to be right: but they contended further, that if the ſtatute did not give, it ought not to hinder a remitter. The above reaſoning, however, of thoſe who were againſt the remitter, went the length of ſaying, that no remitter could be worked in ſuch caſe where the entry was taken away. Yet the decree went no further than to ſay, generally, that the wife was not remitted by force of the uſe, and the execution of the poſſeſſion by the ſtatute [b].

THE clauſe in the ſtatute of uſes relating to jointures was another new ſubject of judical diſcuſſion. The ſtatute is particular in deſcribing what eſtate ſhall be allowed a ſufficient bar of dower. But we ſhall ſee the courts went further, and admitted many others, as within the equity of the act. No deciſion upon this part of the ſtatute in the reign of Henry VIII. has come down to us, unleſs that may be called one, which is reported on the will of *Whorewood*, the attorney-general. *Whorewood* left eſtates of the value of 360l.; of which, to the amount of 60l. his wife was joint-purchaſer with him: by his will he declared that his wife ſhould have, during her life, a third part of all his lands and tenements, together with thoſe ſhe had in jointure, to be aſſigned by his executors, *if it was not contrary to law*. The widow refuſed her jointure of 60l. and demanded 120l. as the third part of the whole, in light of a legacy by the will; and alſo 80l. as a third of the reſidue for her dower. All this appeared in the court of wards; but no regular deciſion ſeems to have been made upon the point of law; for we are told it was by *agreement* decreed and ordered, that ſhe ſhould have the legacy of 120l. and 40l. of the reſidue in lieu of her dower [c]: ſo

What jointures will bar dower.

[b] 1 and 2 Ph. and Ma. Plowd. 111. [c] 38 Hen. VIII. Dyer, 61, 31.

that

that this case proves nothing. But it is said, that in a similar case in 5 Ed. VI. where a manor was devised to enlarge the wife's jointure, and she relinquished her jointure, it was determined she should not have the manor; because, as it was given for *enlargement* of her jointure, the intention of the testator could not be fulfilled[d].

Respecting the nature of the estate given in jointure, we find it laid down positively *per justitiarios* in 6 Ed. VI. that wherever a man makes his wife joint-purchaser with him, after the coverture, of an estate of freehold (except it is in fee-simple) it shall bar the dower, if she agrees to it after his death. A fee-simple would not answer, because it was not named in the act; and further, they held a devise of land to the wife was no bar of dower; for that was a benevolence, and not a jointure[e]. It was agreed, that any joint-estate of freehold was sufficient, though not named in the act: and in conformity with this opinion, it was decided in the case of the duchess of Somerset, in the beginning of the next reign, that an estate to a man and his wife, and the heirs male of their bodies, was a good jointure: and yet that is not one of the five estates mentioned in the act; and the duchess had there brought a writ of dower, under the idea that such an estate was no bar[f].

The remainder of what we have to add of the decisions of courts during these reigns, will relate to the nature and conduct of certain actions, and the alterations that took place in criminal proceedings. Hitherto we have considered actions upon the case as supplying the place of several antient writs. In the last reign, there is an intimation of one being used instead of the action of debt, in matters of simple contract: this was called an *assumpsit*, from the suggestion of an *assumption* or *promise* made by

[d] Dyer 61, 31. in the notes.
[e] B. N. C. 95.
[f] 1 Mar. Dyer, 96, 42, and 97, 48.

the

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

the defendant, for the breach of which the action was brought. We shall now see this liberal action applied to another object with the same success. It was as desirable to devise some action in the room of *detinue*, as it had been to substitute one in the place of that of debt, the wager of law being a legal method of defence in both. We intimated in the last reign, that a new writ to this effect had been made †. We have now authority to speak more particularly of its nature. A writ upon the case had been framed, which surmised, that the plaintiff being possessed of the thing in question, lost it; and that the defendant *found it*, and *converted it* to his own use, upon which the action accrued. This, from the suggestion which gave the cue to the demand, was called an action *sur trover et conversion*, or an *action of trover*; that is, grounded upon a supposed *trover* by the defendant of the thing demanded, and *converting* it to his own use.

THE first action in this precise form, to be found in our books, is in the fourth year of Edward VI g. Again, in 2 and 3 Ph. and Ma. h there is an action of trover; and from the kind of exceptions taken to the declaration, it should seem that the action was considered as a novelty, and as if it had not been long, or not generally, in use; though it must be allowed, that (besides the case in Edward VI.) the actions upon the case above alluded to, in the reign of Henry VIII. are very similar to it. However, it was not till this period that this action was substituted in the place of that of detinue; which, from thenceforward, became gradually less frequent.

THE manner of pleading to this new action of trover, was framed like that used in the infancy of other actions upon the case. The plea was drawn specially, pointing at some material allegation, as it was then conceived, in the declaration; and so concluded either to the court, or the

† Vid. ant. 385.

g Bro, *act. sur le case*, 113. Vide ibid, 109.

h Dyer, 121, 14, 16.

country.

country. The declaration in the caſe juſt beforementioned was this: that the plaintiff was in poſſeſſion of a chain of gold, which he loſt; and that it came *by finding* to the defendant's hands, who ſold it, and *converted it* to his own uſe. To this the defendant pleaded, by traverſing the ſelling *modo et formâ*, as ſuppoſed in the declaration; and then concluded with an averment, and judgment of the action. To this the plaintiff demurred; and it was held by the court, that the plea was good [k]; tho' it was ſaid, that it would have been better to have pleaded *non culpabilis*; which would have anſwered, ſaid the court, all the misfeaſance alledged in the declaration. In like manner, in the action in 20 Hen. VII. which was againſt an executor for goods bailed to his teſtator, the converſion was traverſed.

THE reaſon upon which this kind of pleading was founded, we have before ſhewn, is to be looked for in the old action of detinue. In an action of detinue, in 27 Hen. VIII. [l] it was held, that if a perſon came to the poſſeſſion of goods by bailment, he was anſwerable upon the bailment merely; but if by *finding*, he was chargeable no longer than while he was actually in poſſeſſion of them: therefore, in an action of detinue, where a bailment was ſuggeſted, the bailment was traverſable: and it was the opinion of *Shelley*, that, by the ſame rule, the trover (and the converſion was the ſame) was traverſable. As the action of trover was grounded upon that of detinue, it was natural that ſome of its peculiarities in pleading ſhould be copied from the ſame original.

THE debated queſtion †, whether *aſſumpſit* would lie againſt executors, was again brought forward in 4 and 5 Ph. and Ma. It then received a final determination in the affirmative; and that judgment has governed the courts ever ſince. This was in the caſe of *Norwood* verſus *Read*.

[k] Dyer, 121, 122.
[l] 27 Hen. VIII. 13.

† Vid. ant. 380.

The

CHAP. XXXII.
EDW. VI. PHILIP and MARY.

Aſſumpſit againſt executors.

The plaintiff there declared, that the teſtator, in conſideration of ſo much money to him paid by the plaintiff, promiſed and aſſumed to deliver to the plaintiff, certain quantities of wheat at different days; that the teſtator outlived the laſt day; and altho' the plaintiff was ready at the time and place agreed to receive the wheat and to pay for it, the teſtator did not deliver it according to his aſſumption; nor did the defendants (to whoſe hands ſufficient of the teſtator's goods came to ſatisfy this and all other demands) ſince his death, deliver it, but wholly refuſed. This was the declaration; and to this the defendant's counſel, relying on the laſt determination, demurred in law.

In ſupport of this demurrer, it was argued, that the aſſumption of the teſtator was no other than a *ſimple contract*; and if the executors ſhould be charged with it, on the ſame reaſon ſhould they be charged by every contract executory, as well for debt as for other things; for every contract executory is an *aſſumpſit* in itſelf. They ſaid, it would be inconvenient to charge them as well by contracts *in pais*, as by ſpecialties; for of the former they could have no knowledge. The court had directed that precedents migh be looked for; many were found, and ſhewn to the court: but the counſel for the defendants ſaid, that in all theſe the executors had pleaded in bar, and upon the pleas being tried for the plaintiffs, they had recovered; ſo they contended this proved nothing againſt *them*, for they had demurred, and ſo brought the point directly in iſſue. They ſaid, it was adjudged in 13 Hen. VI. that if the executor pleaded in bar, where he might have waged his law, he ſhould not have advantage of it in arreſt of judgment, or in error; the preſumption of the law being, that the executor is ignorant of the debt; but when he takes upon him the knowledge of it, by pleading in diſcharge thereof, it is reaſonable he ſhould loſe the favor the law intended him: whereas by this demurrer, they ſaid, they took upon them-

themſelves no knowledge of the contract, but prayed the benefit the law gave them on account of their preſumed ignorance. Thus, not being within any of the precedents, there was but one caſe againſt them, and that was in 12 Hen. VIII. [m]; and there it does not appear whether the executors demurred, or not; and if they pleaded in bar, it was no more againſt the preſent caſe, than the precedents beforementioned. But admitting judgment to have been given on demurrer, they then alledged the opinion of *Fitzherbert*, in 27 Hen. VIII. who, as we have before ſeen, pronounced it not to be law [n].

To this it was anſwered, that in this action of treſpaſs upon the caſe, the teſtator could not have waged his law; and they contended it to be a rule of law, that where the teſtator would not be allowed this privilege, the action would lie againſt the executors. They ſaid it was not reaſonable, if they had aſſets to pay debts and legacies, and alſo to pay the plaintiff, that they ſhould retain the reſt of the goods to their own uſe, being only put in truſt for the benefit of the teſtator's eſtate: that the judgment in 12 Hen. VIII. being given by the court, was not ſo eaſily to be rejected on the mere *dictum* of *Fitzherbert*. They admitted there might be ſome weight in the objection to the declaration not averring that there were aſſets after paying the *legacies*; and they thought the juſtices had better give judgment upon this, than on the principal matter. Upon ſearching the record of the caſe in 12 Hen. VIII. it appeared, that the averment of aſſets did not extend to *legacies*, as the report ſays, but only to debts, and to ſatisfy the plaintiff alſo; which exactly correſponded with the preſent declaration.

THESE were the arguments on both ſides; and the juſtices were ſo eaſily ſatisfied on the ſubject, that they gave judgment for the plaintiff, as Plowden ſays, without any

[m] Vid. ant. 381. [n] Vid. ant. 381.

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

solemn argument. We are informed from the same authority, that many learned persons had entertained doubts upon the decision in 12 Hen. VIII. not thinking that case to be well adjudged; and that such action was not maintainable by the antient law, but *that conscience had encroached the case upon the common law.* He himself, however, was of another opinion; and he even judged the action to be good, without surmising that the executors had assets to pay debts, and satisfy the plaintiffs also[o]: so far was he from agreeing with those who would have had the averment to include *legacies.*

Witnesses in treason.

We shall now consider what was done by our courts in addition to the many alterations that had been made by the legislature in our criminal law. The statutes relating to witnesses in treason are the most striking part of the penal laws in this period; and very few years elapsed before the judges were called upon to come to some resolutions on the construction of them, as has already been hinted when we spoke of those statutes. At Serjeant's-Inn, in the fourth year of Philip and Mary, the judges came to the following resolution on the statutes concerning witnesses: That on the trial of treason and misprision of treason, there were required by the statutes two accusors or witnesses to the indictment, or sayings and accusations in writing under their hands, or the testimony of others to such accusation, which should be read to the jury on the indictment. Should the accusors happen to be dead at the time of the indictment, they held it sufficient if the accusation was there testifying the fact, for then there were two accusors. They held likewise, that for any treason under stat. 25 Ed. III. there needed no accusors at the trial, because it was enacted by stat. 1 and 2 Ph. and Ma. c. 10. that all trials of treason should be by the order of the common law, and not otherwise; and the trial by common law was

[o] Plowd. 180.

by

by jury and witneſſes, and not by accuſors. The ſame of treaſon in coining, there needed no accuſors at the arraignment, but only at the indictment. But they held, that in all treaſons under ſtat. 1 and 2 Ph. and Ma. c. 10. there ought to be witneſſes or accuſors, as well at the indictment as at the arraignment, purſuant to a clauſe at the end of that act. Again, in miſpriſion of treaſon, there ought to be witneſſes or accuſors, as well upon the indictment as the arraignment, by ſtat. 1 Ed. VI. c. 12. at the end; for ſtat. 1 and 2 Ph. and Ma. before-mentioned, repeals accuſors at the trial in caſes of treaſon only, and not in miſpriſion. They agreed alſo, that petit-treaſon ought to be tried as high-treaſon, namely, by accuſors at the indictment, but that there needed no accuſors at the trial. In theſe reſolutions the following perſons concurred; namely, *ſir William Portman*, chief-juſtice; *Mr. Hare*, maſter of the rolls; *ſir Robert Brook*, *ſir David Brook*, *ſir Humphrey Brown*, *ſir John Whiddon*, *ſir Edward Saunders*, *ſir William Staunforde*, and *maſter Daliſon*, juſtices; *Dyer*, ſerjeant; and *Griffin* and *Cordell*, attorney and ſolicitor-general. They agreed alſo, that counſellors who give evidence againſt traitors are not accuſors; which was a reſolution more in favour of the ſubject, than thoſe which allowed the written accuſations to ſupply the place of *vivâ voce* teſtimony. It may be added here, from *ſir Robert Brook*'s own words, that by the civil law accuſors were as parties, and not witneſſes; for witneſſes ought to be indifferent, and not come till they are called; but accuſors offer themſelves to accuſe; and conformably with this idea, our law had allowed it as a good challenge to a witneſs to alledge, that he was one of the priſoner's accuſors [p].

The judges in the above reſolutions went no further than to agree upon the number of accuſors; and to ſay

[p] We have before obſerved, that what is here ſaid of accuſors is wholly conſonant to the principle of criminal proceeding in the canon law. Vid. ant. 505. New Caſes, 76.

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

that their written accuſation would be received as equally legal with their verbal evidence. In a formal trial, in the firſt year of the queen, it had been held, with regard to the credibility of the accuſation, that it was ſufficient for one of the accuſors to ſpeak of his own knowledge, or own hearing; and then having related the fact to another, that other perſon might be a good accuſor under the act. Thus ſir Nicholas Arnold, who accuſed William Thomas of treaſon in ſpeaking words tending to the death and deſtruction of the queen, and made this accuſation upon his own hearing, had, at the requeſt of William Thomas, reported the ſame to ſir James Croftes; ſir James Croftes reported them to John Fitzwilliam, who was ſuppoſed a proper perſon to be employed to kill the queen; and he told them to ſir Thomas Wiatt: here the court held every one of theſe perſons to be a proper accuſor: a determination, which made it wholly unneceſſary to repeal the ſtatutes of Edward VI. it being after this in vain to require fifty witneſſes; for the ſame principle would have ſupplied any number from the knowledge of one alone [q].

In the ſame year it was declared, at the arraignment of ſir Nicholas Throckmorton, and was repeated in the ſtar-chamber to the jury (who were arraigned there for their verdict of acquittal), by the opinion of the juſtices, that where two or more conſpired to levy war, or commit any other treaſon, and one of them executed it, this was treaſon in all [r].

It ſeemed to be a determination to ſtrain the law of treaſon, as well private as public. It was laid down this ſame year, that if a ſon or daughter-in-law kill a father or mother-in-law, who furniſhes board or lodging, and to whom they do neceſſary ſervices, ſuch a perſon, if indicted *proditorie*, ſhould be found guilty of petit-treaſon, though there were no wages paid [s]. A caſe happened where a

[q] 1 Mar. Dyer, 99, 68. [r] 1 Mar. Dyer, 98, 56. [s] Dal. 14, 2.

female

female ſervant and a ſtranger conſpired to rob the maſter, and at the appointed time ſhe admitted him into the houſe, and conducted him with a candle to her maſter's bed, where he killed him, the ſervant doing and ſaying nothing, but only holding the candle: it was a queſtion, whether the ſervant was guilty of petit-treaſon, conſidering the ſtranger was principal actor, and only guilty of murder. The judges were divided upon it. *Portman* and *Brook*, the two chief-juſtices, with *Hare*, the maſter of the rolls, conſidered it as treaſon; *Brook*, chief-baron, with *Daliſon* and *Staunforde*, juſtices, maintained the negative [t]. A ſimilar queſtion had been decided in the affirmative in the time of Rich. III. A man having ſeiſed on the ſea ſome goods of an enemy, took them into a houſe, where he was attacked by a perſon pretending to have an authority from the admiral, and ſupported by a multitude of perſons: a woman, without any weapon, iſſued out of the houſe, and was killed by one of the perſons who came to take the goods, and had thrown a ſtone at another in the gate. It being a queſtion whether this was murder, the juſtices and ſerjeants were divided; ſome thinking, that if ſhe came out in defence of the houſe, it was murder in all the perſons attacking the houſe; others, among whom were *Brook*, *Staunforde*, and *Dyer*, thought otherwiſe; for (ſay they) no malice was prepenſed againſt the woman, and the imputation of murder cannot be extended further than the party's deſign. The former ſupported their concluſion by ſaying, that if two were fighting, at an appointed time and place, and a ſtranger interfering to part them, was killed by one of them; this, conformably with ſome opinions as old as the reign of Edward III. was murder in the ſlayer; and ſome thought it was murder in both [u].

A CASE very much like this ſuppoſed one, had really happened in the firſt year of queen Mary's reign. This

[t] 2 and 3 Ph. and Mar. Dyer, 128. 57. [u] 2 and 3 Ph. and Ma. Dyer, 128. 60.

was

was *Salisbury*'s case. The jury upon the trial put this question, with relation to one of several that were indicted for murder, Whether if the defendant was in company with them who of malice prepense killed the deceased, and when he saw them combating together took part with them suddenly, without any malice prepense, and struck the deceased, together with the others, he was guilty of murder or manslaughter; to which the court answered, if he had no malice prepense, but suddenly took part with those who had, it was manslaughter, and not murder. The fact upon the evidence being, that the intention was not to kill the deceased, but his master, the judge laid down the law upon that head, namely, that killing one man upon a malice conceived against another is murder. There arose another point in this case, which must startle a modern reader, and is well worthy of observation.

Distinction between murder and manslaughter.

We have seen in the reign of Henry VIII. that a man found guilty of manslaughter, on an indictment of murder, was by all the judges held guilty of the whole indictment, and was accordingly executed [x]. In the present case, the jury found that *Salisbury* killed the deceased, but not of malice prepense; and so they acquitted him of the murder, and found him guilty of the manslaughter. Upon this, it was privately debated upon the bench, whether he should be intirely acquitted by this verdict, inasmuch as he was arraigned of murder, and was acquitted thereof; or whether he should have judgment to be hanged for the manslaughter; or, thirdly, whether this verdict should serve for an indictment of manslaughter, or what else should be done: and it was clearly the opinion of the whole court, that they might give judgment against him to be hanged for the manslaughter. In support of this, they said, that the jury might give a verdict at large, and find the whole matter; as if one was arraigned of the death of a man, and he pleaded not guilty, the jury might find that he killed

[x] Vid. ant. 393.

him

him in his own defence. In this caſe, therefore, where he was arraigned for killing a man with malice prepenſe, the ſubſtance of the matter was, whether he killed him or not; and the malice prepenſe was but matter of form, or the circumſtance of killing. And though the malice prepenſe makes the fact more odious, and for this cauſe the offender ſhall loſe ſeveral advantages which he would otherwiſe have, as ſanctuary, clergy, and the like; yet it is nothing more than the manner of the fact, and not the ſubſtance. The ſubſtance and manner being both in iſſue together, if the jury find the ſubſtance, and not the manner, judgment ſhall be given according to the ſubſtance. Though the court were clear in this opinion, they thought it better, as they were on the circuit, to take the opinion of the ſages of the law, and in the mean time they granted a reprieve. What was finally done in this caſe does not appear.

THIS difficulty was occaſioned by the late ſtatutes of Hen. VIII. and Ed. VI. that had taken clergy from thoſe convicted or attainted of murder of malice prepenſe; ſince which a diſtinction had ariſen in point of privilege, and ſo of puniſhment, between felonious manſlaughter, and felonious murder with malice prepenſe. Before theſe acts, if the jury had acquitted a priſoner of murder, and of the malice, yet there was ſtill a felonious killing contained in the indictment, which could only be qualified by finding it to be *ſe defendendo*, or *per infortunium*. It appears from our oldeſt writers upon criminal law, that the only object in proſecutions of this ſort, was to fix on the defendant the charge of felonious killing; namely, *nequiter et in feloniâ et præmeditato aſſultu fecit plagam mortalem, &c.*: this was therefore moſt truly the ſubſtance of the charge. Murder was in former times ſo very diſtinct a crime from felonious killing, that they could hardly be enquired of together; at leaſt murder could never have been a ſubject

[y] Plowd. 100.

of

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

of enquiry before the jury who were to try the felonious killing; being always to be enquired of by a preſentment of Engliſhery [z]. We have before ſeen, that when theſe preſentments were aboliſhed by law, the term *murder* had loſt all legal meaning or uſe; till, by degrees, it crept into indictments, and was adopted at firſt, merely to aggravate the charge, which was thought then to ſound more malignant, tho' it was not heightened in the eye of the law. However, ſuch efficacy was attributed to this term, that in time it became, in its adopted ſenſe, as technical as in its old one, and every indictment for felonious killing was required to alledge *quòd murdravit*. At length this became the principal charge and git of every indictment: in the laſt reign it had been determined to *imply* malice; ſo that *murdravit* was ſufficient, without the addition *ex malitiâ præcogitatâ* [a]; a ſuggeſtion which was more antiently the indiſpenſible requiſite of all appeals and indictments for homicide.

WHEN, therefore, *murder with malice prepenſe* had taken the place, as it were, of felonious homicide, and became the ſting of ſuch indictments, the common apprehenſion muſt be, that an acquittal of the murder and malice was an acquittal of the felonious killing. But when the ſtatutes of Hen. VIII. and Ed. VI. had ſingled out *murder with malice prepenſe* as a mode and circumſtance of killing which ſhould no longer enjoy the benefit of clergy, the judges began once more to ſeparate the legal ideas of murder and felonious homicide; and to ſay, as on this and another occaſion which has been mentioned, that there ſtill remained a felony in the indictment; and tho' the priſoner was acquitted of the murder, yet if the jury convicted him of killing (without adding the qualification of *ſe defendendo*, or *per infortunium*), they convicted him of a felony, for which he ſhould have judgment to

[z] Vid. ant. vol. II. 22. [a] 5 Ed. VI. Dyer, 69. 2.

die;

die; and to this felonious killing they gave the name of *manſlaughter*, and ſometimes *chance-medley*. The former of theſe words, it is obvious, was only another term for homicide; the latter was to expreſs a ſudden affray, or ſcuffle, *chaud-melée*; it being under ſuch circumſtances that the killing here meant to be ſignified moſt uſually happened. Conformably with this new conſtruction of the judges, homicide is thus divided by Staunforde, who wrote three or four years after the time of which we are now ſpeaking. He ſays, that killing a man is either *juſtifiable*, or *ſe defendendo*, or *per miſadventure*; and if it is not one of theſe three, it is *voluntary homicide*, which he ſubdivides into two; the more heinous ſpecies, called *murder*; the leſs heinous, called *chance-medley* [b].

THE judges ſeem to have been governed in their conſtruction of theſe ſtatutes by technical reaſons like thoſe abovementioned; but, however artificial it might be in its commencement, the diſtinction between murder and manſlaughter has been ſince upheld and explained upon the beſt and wiſeſt principles of penal juſtice. A conviction of the frail ſtate of humanity induces one to pronounce it a great defect in our old law, that no allowance was made for the paſſions of men: if a man was killed in a quarrel, or on a ſudden affray, it was equally felonious as if by a deliberate act. But ſince the time of the above diſtinction, ſuch an act, which could not be excuſed under the idea of ſelf-defence, or miſadventure; nor could, conſiſtent with the feelings of the mind, as well as the dictates of plain ſenſe, be ſtigmatized with the name of premeditated murder; might yet be ſubjected to a proportionate puniſhment, under the name of *manſlaughter*, or *chance-medley*. It follows, that after this change of ſentiment, much of what is delivered in our earlier writers and reports on queſtions of homicide, muſt be read with

[b] Staunf. 19. 2.

great

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

great caution, as inapplicable to, and irreconcileable with, the notions which began to prevail from this time to the preſent day. This is remarkable not only in points that ariſe about a killing on a ſudden affray, but more particularly in queſtions of *ſe defendendo*; the old law upon which is be come almoſt unintelligible.

To return to the doubt of the judges upon the caſe before them. Notwithſtanding the explicit manner in which they delivered their opinion, that the ſubſtance of the indictment was found, and that judgment of death ſhould be given, they could not mean that the manſlaughter of which he was convicted, and the murder of which he was acquitted, were the ſame degree of offence, and were to be equally puniſhed by hanging; for they had themſelves ſtated this difference, that murder was deprived of clergy, but manſlaughter was not. It ſhould ſeem then that the difficulty intirely aroſe from one of theſe circumſtances; either that the party had deferred demanding his clergy till after judgment of death had been paſſed, or that he was not a clerk; or that the judges heſitated, not about the fate of the priſoner, but the form of entering the judgment. It is only in one of theſe ways, that the judgment of death here ſpoken of can be accounted for.

It is remarkable that the definition of *larceny* given by *Staunforde*, is that which *Bracton* had formed ſo many centuries before; and this is laid down and commented on by *Staunforde* as the law of his time; though this offence, in its legal conſideration, had been much altered from the time of Henry III. and an entire new deſcription was made of it, at leaſt by the time of Edward IV. as we have ſeen in the former part of this Hiſtory [e].

Robbery is defined by this writer to be, when a man takes any thing from the perſon of another felonioufly, though the thing taken be not worth a penny [f]; a defini-

[e] Vid. ant. vol. III. 410. [f] Staunf. 27, 2.

tion

tion which later writers have narrowed, by reſtricting it to a taking with force, and a putting in fear. It was an opinion of juſtice *Hales* in 7 Ed. VI. that it was no felony to take a diamond, ruby, or other ſtone (not ſet in gold, or otherwiſe) becauſe they are not of price with every one, though ſome hold them valuable and precious.

IT was held in 4 Ed. VI. [g] that the breaking of a houſe ſhall not be burglary, unleſs it is by night. This is the firſt paſſage in any book where burglary is confined to a breaking by night [h]. In the old books it is ſaid to be the ſame, whether by night or by day. According to this late determination *Staunforde* has formed his deſcription of this crime, collected from the many deciſions ſince the time of *Britton* and *The Mirrour*, which is to this effect: "*Burglars* are thoſe who felonioufly, in time of peace, break a "houſe, church, walls, or towers, though they take nothing "from thence; but then it muſt be done with intent to "commit a felony, and in the night [i]." As to the circumſtance and kind of *breaking*, the following point was reſolved in 3 Ed. VI [k]: A perſon was taken in the night putting back the leaf of a window with a dagger: this was held to be burglary. The like was reſolved where a man was found drawing the latch of a door, which was not otherwiſe faſtened [l]. It was held, that *fregit* alone in an indictment was not ſufficient, but it ſhould be *fregit et intravit* [m].

ACCORDING to *Staunforde*'s definition, the breaking might be either of a houſe, church, wall, or tower. It was held, in 2 Ed. VI. that where a ſtable was near a houſe, and inheritable as parcel of a houſe, and it was broke by night with intent to rob, this was a burglary [n].

THE law of principal and acceſſary always furniſhed ſome ſubject of argument and difficulty. In a caſe which

Trial of principal and acceſſary

[g] Bro. Cor. 185.
[h] Vid ant. 472.
[i] *Noctanter*. Staunf. 30. a.
[k] Lamb. Irenarch. 258.
[l] Ibid.
[m] 1 Mar. Dyer, 99, 58.
[n] New Caſes, 75.

happened

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

happened at Shrewſbury at the ſame time with the above caſe of *Saliſbury*, it happened that ſeveral were indicted for murder, and ſeveral others for being preſent aiding and abetting. The latter were the only perſons in cuſtody; and it was ſubmitted by ſir Thomas Bromley, the chief-juſtice, to the others in the commiſſion with him, whether theſe men ſhould be arraigned; for although they were principals as well as thoſe who ſtruck the blow, yet they were principals only in the ſecond degree, in reſpect of the act of the others; and if it ſhould happen that theſe ſhould be convicted, and then the others be tried and acquitted, a new difficulty and inconvenience would follow; for they would be found guilty of abetting a fact that was never done; and when it is recollected that in the old law perſons preſent aiding and aſſiſting were deemed to be acceſſaries and not principals, he thought it deſerved ſome conſideration. After two days heſitation, the other juſtices were of opinion, that thoſe who were aiding and aſſiſting were in truth and fact, to all intents, as much principals as thoſe who did the fact; for they cauſed a terror in the party, and thus diſabled him from reſiſting and defending himſelf, which was the ſame as giving the ſtroke; it was therefore not proper to ſay, that the one were principals in deed, and the others in law, but they are all prinpals in deed and in the ſame degree. They ſaid, therefore, that ſhould the jurors give a ſpecial verdict, and find that the deceaſed was ſtruck by another than the perſon alledged in the indictment to have ſtruck him, and find theſe guilty of aiding and being preſent, the verdict would be a ſufficient conviction. The ſame if thoſe who gave the wound ſhould die, the aiders who were preſent might be arraigned; which ſhews they were equally principals, and not in the ſecond degree. In this the chief-juſtice and the reſt agreed, and the priſoners were accordingly tried [o].

[o] Plowd. 97.

A MAN

A MAN was indicted as acceſſary both to the principals abſent and thoſe preſent; and *Bromley* ſtarted a doubt, whether he ſhould be arraigned as acceſſary to the principals now preſent; for he could not be arraigned as acceſſary to thoſe abſent. If he was arraigned in this way, he might be acquitted of being acceſſary to thoſe preſent, and yet he might really be acceſſary to thoſe who were abſent; but could not be a ſecond time arraigned for the ſame fact; for though being acceſſary to one is not being acceſſary to another, yet the fact, which is the death of the deceaſed, is all one. The juſtices did not agree to this as a cauſe for deferring the arraignment: for they ſaid, though he was arraigned as acceſſary to thoſe preſent, and ſhould be acquitted, he might well by law be arraigned as acceſſary to the others; but in conformity with the general practice, and the authority of a caſe in the book of Aſſiſes[p], they deferred the arraignment till he could be arraigned as acceſſary to all the principals together[q]. *Plowden* remarks upon this practice of deferring the arraignment of the acceſſary till he could be arraigned as acceſſary to *all* the principals together, that it was more out of good diſcretion than neceſſity: it is, ſays he, to ſave the country the trouble of furniſhing two or three juries, when one might do the whole; and he agrees with thoſe who ſaid the acceſſary if acquitted as acceſſary to one, might afterwards be tried as acceſſary to the others[r]. We find in 4 Ed. VI. two caſes, where a man who had been acquitted as acceſſary, was afterwards indicted of the ſame felony as principal; and notwithſtanding his former acquittal, he was arraigned, convicted, and hanged. It does not appear whether this was an acceſſary before or after the fact[s].

WHERE five priſoners were arraigned together, and they did not join in their challenges, it was held, that tho'

[p] 40 Aſſ. pl. 25.
[q] Plowd. 98.
[r] 7 Hen. IV. 107. Plowd. ibid.
[s] New Caſes, 75.

the

the arraignments were ſeveral, yet as one *venire*, and upon that a *tales*, was awarded for all, therefore a juror challenged by one was held to be drawn againſt all. But the bench perceiving that the priſoners by thus ſevering in their challenges, would each have the liberty of challenging twenty jurors, which would exhauſt a greater number than thoſe ſummoned and in the town, and ſo prevent a trial taking place; they were going to ſever the pannel, upon the authority of a precedent in the time of Ed. IV.[t]: ſo that the ſame men might ſerve for five ſeveral inqueſts. The priſoners ſeeing this, were induced to agree in their challenges[u]. It was ſaid, that a man could not abjure for high-treaſon; there was ſome doubt, whether an offender in petit-treaſon might abjure. There is mention in a Chronicle of Henry VI. of a woman abjuring who had killed her miſtreſs; but ſuch writings are deceitful authorities for points of law[w].

Reformation of the eccleſiaſtical law.

In the ſhort reign of Ed. VI. ſome ſteps were taken towards effecting the intended reformation in our eccleſiaſtical laws. We have ſeen that Henry VIII. was empowered by ſtatute to appoint commiſſioners to reform the eccleſiaſtical laws then in force. A commiſſion was iſſued under that act, and the perſons appointed to execute it had met, and made ſome progreſs in the undertaking; but after the ſtatute of the ſix articles, the reformation of the eccleſiaſtical law dropt with that of religion; and Cranmer, in a letter, dated 1545, ſpeaks of this ſcheme as then almoſt forgotten, and quite laid aſide[x].

We have ſeen there was an act of Edward VI. to empower thirty-two perſons, named by the king, to undertake this ſame work, which it was intended ſhould be finiſhed in three years. But this alſo was retarded by various changes in affairs; and it was not till November 1551, that a commiſſion was iſſued to eight perſons, to pre-

[t] 9 Ed. IV.
[u] Plowd. 100.
[w] New Caſes, 78.
[x] Burn. Ref. vol. II. 185, 186.

pare

pare the matter for the reviſion of the thirty-two; a method which was thought more likely to expedite the undertaking, than if it had been left to the greater number. Theſe eight conſiſted of ſome biſhops and doctors of divinity, two doctors of the civil and canon law, and two common-lawyers. As two of the three years had elapſed before they ſet about executing the commiſſion, they prayed to have longer time; and they had three years more offered them by act of parliament, to which act, however, the king never gave his aſſent; owing, as it is thought, to the forwardneſs in which the work was believed to be, and that a further continuation of time was not neceſſary. The work was prepared by February 1552, and a commiſſion was granted to thirty-two perſons, of whom the former eight were a part. It conſiſted of eight biſhops, eight divines, eight civilians, and eight common-lawyers. They were to reviſe, correct, and perfect the work; and then preſent it to the king. For this purpoſe they divided themſelves into eight claſſes, four in a claſs: every one of theſe was to prepare his corrections, and communicate them to the reſt. Thus was the work carried on and completed; but before it received the royal confirmation, the king died, and the project died with him. It was not afterwards revived, nor has any thing of the kind been attempted ſince. The old canons ſtill remained in force by uſage and the ſtatute of Henry VIII. and ſo they continue to this day [y].

However, this compilation was printed in the reign of queen Elizabeth, under the title of *Reformatio Legum Eccleſiaſticarum*. In the preface it is ſaid, that *Cranmer* executed almoſt the whole volume himſelf; which juſtified the opinion before entertained of him, that he was one of the beſt canoniſts in the kingdom. *Sir John Cheek* and *Dr. Haddon* had been employed to put it into

[y] Burn. Ref. vol. II. 185, 186.

Latin;

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

Latin; in performing which they imitated the ſtile of the Roman laws with a happineſs far beyond the compoſers of the pontifical law [z].

[a] AFTER the taſte we have already had of the law and practice of the eccleſiaſtical courts, we feel ſome curioſity to ſee what where the ideas of the reformers upon the ſame ſubject. On a view of their ſcheme of reformation, it appears that they worked upon the old materials, and were not precipitate in making any alterations of conſequence. The canon and civil law, and the provincial and legatine conſtitutions, were ſtill to be the ground-work of our eccleſiaſtical law. But theſe underwent ſome change and modification in certain articles.

THE law of matrimony, adultery, and divorce, was intended to be almoſt wholly altered by the new ſcheme. For this purpoſe, in the firſt place, it was expreſsly laid down, that no promiſe or contract ſhould be binding, but ſuch as was made in the following way. The miniſter was to publiſh the intended marriage on three Sundays, or at leaſt feaſt-days; at the end of which the man and woman were to be preſent in the church while the ceremony, lately ordained, was performed: ſo that all the canonical learning about eſpouſals and pre-contracts was at once done away. But to prevent the ill conſequences that might follow to young women who had yielded to the promiſes and ſolicitations of men, the penalty of excommunication was denounced againſt thoſe who were guilty of violating a woman's chaſtity: and if they would not conſent to marry the woman, the eccleſiaſtical judge was to give to her a third part of his goods: if the goods could not be divided in that manner, he was to condemn him to take care of the child, and to undergo ſuch penance as the judge thought neceſſary to expiate the ſcandal.

Of marriage.

[z] Burn. Ref. vol. II. 185, 186. [a] Vid. ant. 1, &c. 45, &c.

THE

THE marriage of children and orphans was declared void, if not contracted with the consent of their parents and guardians; but if these with-held their consent without sufficient reason, recourse might be had to the ecclesiastical judge, who was to decide on the propriety of the matter. A woman at twelve, and a man at fourteen, and not before, might marry. Marriage might be celebrated at all seasons; but it was to be in the parish where one of the parties inhabited, or the minister would be excommunicated. At the time of the ceremony any one might interpose, and shew cause why the marriage should not take place; and upon giving security to prove the cause within a month, or make satisfaction for all the expence of preparation for the marriage, the ceremony was to be delayed for that time; and neither party was to contract marriage during that month, under pain of excommunication, and compensation to the party so deserted. If there was a secret inability for the marriage-state in either party, the marriage was deemed to be null; otherwise if it was known. Deaf and dumb persons might marry, and those who were mad, in a lucid interval. There was to be no marriage with infidels. With these exceptions marriage was, upon this new scheme, allowed to all persons of what condition soever, and might be repeated. But this was not to give licence to polygamy; for it directs, if any person had more wives than one, he should retain only the first, if she would have him for a husband, and dismiss all the others with their dower, and make satisfaction to the church for his offence. The women also were to be punished, if they were conscious of the man having more wives than one.

AFTER the marriage was concluded, if quarrels and bickerings arose between them, and they were unwilling to continue together, they were to be compelled by ecclesiastical censures to accommodate differences, and live in matrimonial harmony, unless those differences were of

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

ſuch a nature as we ſhall hereafter ſee were grounds of a divorce. It was laid down, that any marriage contracted under the influence of force or fear ſhould be void. Thus far of marriage in general [a].

THE degrees within which marriage was prohibited, were thoſe contained in Leviticus, ch. xviii. and xx. which they ſaid was a rule not confined to the Jewiſh nation; but, like the decalogue, was to have authority with all Chriſtian men. They therefore declared it to be impiety in the Roman pontiff to arrogate to himſelf the power to diſpenſe with theſe divine prohibitions. As to the conſtruction of theſe prohibitions, they ſaid, many were only put for examples, and we muſt ſupply others, which ſtand in preciſely the ſame ſituation; thus, for inſtance, if a ſon is not to marry his mother, ſo a daughter is not to marry a father. They therefore laid down two rules: firſt, that wherever males were mentioned, the ſame ſhould be underſtood of females in the ſame degree of propinquity: ſecondly, that huſband and wife made but one fleſh; ſo that in whatſoever degree of conſanguinity a perſon was related to the one, he was related in the ſame degree of affinity to the other. They retained the old notion of the canon law, and conſidered any illicit connexion as creating an affinity the ſame as marriage; and they held the impediment of affinity to continue after the death of the party. But they declared that all ſpiritual cognation was an invention not authoriſed by ſcripture, and therefore ſhould no longer be an impediment to marriage [b].

THE reformers of our eccleſiaſtical law preſcribed very heavy penalties in caſe of adultery; founding this ſevere meaſure on the Jewiſh law; which directed ſuch offenders to be ſtoned to death; and on the civil law, which puniſhed them capitally. When a miniſter was convicted of adultery, fornication, or inceſt, his goods, if he was married, were all to devolve to his wife and children; if he had no

[a] Reform. Leg. Eccleſ. 37. to 43. [b] Ibid. 44. to 47. Vid. ant. 52. &c.

wife

wife nor children, they were to be diſtributed to the poor, or applied to other purpoſes, at the diſcretion of the eccleſiaſtical judge: if he had any benefice, he was to forfeit it, and to be incapable of taking another: he was likewiſe to be ſent to perpetual exile or impriſonment. A layman convicted of adultery was to reſtore to his wife her *dower**, and alſo half his goods; he was likewiſe to be condemned to perpetual exile or impriſonment. A wife, in like manner, if convicted of adultery, was to forfeit her *dower*, and all claim ſhe had by law, or promiſe, on the effects of her huſband; and was to ſuffer perpetual exile or impriſonment. Moreover, in ſuch caſe the innocent party might contract another marriage: this ſecond marriage they thought juſtified by the words of Chriſt, who made an exception of the caſe of adultery. However, they recommended that the guilty party ſhould in charity be invited by the innocent to return to the conjugal ſtate; and at no rate ſhould be allowed to marry again. None was to put away his wife for adultery, and take another, till the eccleſiaſtical judge had heard and determined the matter; and if he did, he loſt all right of proceeding againſt his wife. The judge, when he condemned the one of adultery, was to pronounce a liberty to the other to marry again: there was to be a time limited for ſuch ſecond marriage, as a year, or ſix months; during which if he did not return to his firſt wife, he might take another. If one of the parties withdrew from the other, and, after intreaty and remonſtrance, would not ſubmit to cohabit, the other might, upon authority of the eccleſiaſtical judge, have liberty to marry. If the abſent perſon could not be found, then proceſs was iſſued, and a term of two or three years was to be fixed by the eccleſiaſtical judge for him to appear and ſhew good cauſe of his abſence; which if not done, the other party was abſolved from the tie, and might marry again; and if he afterwards appeared, he was to be confined to perpetual

* The word in the original is paſſage, but leſs ſo in the following. des; and as ſuch is ambiguous in this

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

impriſonment. The eccleſiaſtical judge might proceed in the ſame manner, where the abſence was on ſome lawful calling, if nothing had been heard of him for ſome time; and the other party might, in like manner, marry: however, if the abſentee could give good reaſon for his being detained, his wife would be obliged to receive him again: if he could not ſhew good cauſe of abſence, he would be puniſhed with perpetual impriſonment, and the ſecond marriage would be good.

If there was irreconcileable enmity between two married perſons, ſo that one had plotted the other's deſtruction, it was a cauſe of divorce. If a huſband treated his wife with ſeverity, the eccleſiaſtical judge might uſe remonſtrances, and then compel him to give ſecurity to treat her well. If this did not ſucceed, it muſt be attributed to irreconcileable enmity, and was therefore a good cauſe of divorce. The judge might proceed in like manner with women who were obſtinate and rebellious. In all theſe caſes the innocent party might marry; but the offender would be committed to perpetual impriſonment.

The reformers laid it down, that an incurable diſeaſe contracted by either party, ſhould not be a cauſe of divorce. During a ſuit with his wife on the ground of adultery or ill-treatment, the huſband was required to ſupport her according to her condition. If the huſband failed in a ſuit againſt his wife for adultery, he was to forfeit to her half his goods, and was afterwards to have no power to diſpoſe of the goods ſo forfeited: the wife, if ſhe failed, was to loſe her *dower*, and all claim ſhe had upon the huſband's effects. If ſuch action was brought by any ſtranger, he would not be admitted to church till he made compenſation to the party calumniated. If the party convicted of adultery could prove the other to be equally ſo, they would both ſuffer the ſame puniſhment, and the marriage would continue ſtill in force. The ſeparation *a menſâ et*

toro

toro was entirely taken away by the reformers, as productive of great abuſes and ſcandal in the marriage-ſtate [c].

WHILE the reformers were projecting this change of the old law of ſeparation *a menſâ et toro*, an incident happened reſpecting a diſtinguiſhed perſonage, that led to the public diſcuſſion and deciſion of this very point. The marquis of Northampton had been ſeparated from his wife on account of her adultery. This happened in the reign of Henry VIII. when it was conſidered, whether ſome relief might not be contrived for the innocent party, to whom ſeparation was but a very partial, and ſometimes a hazardous, redreſs. In the firſt year, therefore, of Edward VI. a commiſſion of delegates was directed to ten perſons, of whom ſome were biſhops, to try whether the marchioneſs was not by the word of God ſo lawfully divorced, that ſhe was no more the marquis's wife; and whether he might not thereupon marry again. As this was a new caſe, the delegates, to inveſtigate it thoroughly, took longer time to give their judgment than that nobleman choſe to wait; for he, in the mean while, was ſolemnly married again. As the firſt marriage ſtill ſubſiſted in law, this gave great ſcandal, and he was put to anſwer for it before the council; where he defended what he had done by ſaying, that all ties between him and his former wife were diſcharged by the law of God; that making marriages indiſſoluble, was a popiſh contrivance to get money; that ſeparation only led to temptations; and the like. However, he was by that tribunal enjoined to part from his new wife till the delegates had given ſentence, and then further order ſhould be made in it. To this the marquis conſented. In concluſion, after a long enquiry, the delegates, in the ſpirit of the deſigned reformation, actually determined in favour of the ſecond marriage. Upon this the marquis was ſuffered again to cohabit with his wife;

[c] Reform. Leg. Eccle. 47. to 56.

but

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

but afterwards, to make all ſure, he thought it adviſeable to get this ſentence confirmed by a ſpecial act of parliament [d].

THIS was a ſevere blow upon the canon law; and it was thought proper, in queen Mary's reign, to repair the breach that had thereby been made. An act was brought in to repeal the ſtatute made to confirm this marriage. It was much debated in the houſe of commons; and was at laſt, by various alterations, ſo qualified, that, it threw no imputation on the parties, but only declared, that, in that particular caſe, the divorce was unlawfully made. The act at firſt probably contained a clauſe againſt all divorces of the ſame kind; many of which, no doubt, had been made in conſequence of this precedent [e].

Of wills.

THE reformers deſigned ſome alterations in the law of wills*, the principal of which conſiſted in the following particulars. They allowed the liberty of making a will to all perſons of either ſex, and of every condition; but they excepted from this general authority all wives, *ſervi*, and minors under fourteen years, heretics, and thoſe condemned to death, or perpetual exile, or chains; which two latter puniſhments we have ſeen were very commonly inflicted in this new ſyſtem of juriſprudence. Thoſe who did not diſmiſs their concubines before they were *in extremis*; thoſe who had two wives, or two huſbands; thoſe convicted of *famoſi libelli*; thoſe who were proſtitutes or procureſſes, unleſs they had undergone temporal puniſhment for their crimes; thoſe guilty of uſury, unleſs they had refunded or made ſatisfaction, or taken meaſures for ſo doing; all theſe were prohibited from making wills. However, they allowed perſons who kept their concubines, or had two wives, or two huſbands, to diſpoſe of their goods *in pias cauſas*; and the like indulgence was given to uſurers who had made no reſtitution, and to thoſe who had been proſtitutes or procureſſes.

[d] Burn. Ref. vol. II. 53, 54. [e] Ibid. 237. * Vid. ant. 66.

THE

THE articles which they reckoned within the deſcription of *piæ cauſæ* were theſe: in addition to the relief of priſoners, and of the poor, the aſſiſtance of orphans, widows, and afflicted perſons of all ſorts, as was required by our old law, they particularly preſſed theſe objects; to promote the marriage of young women, the ſupport of ſtudents in the univerſities, and the reparation of highways. If any diſpoſition rather of a ſuperſtitious than pious nature was made, the biſhop was to interpoſe his authority, and ſee that it was applied to ſome *piæ cauſæ* †.

THE diviſion of the deceaſed's goods, whether by will or without ‡, was required to be in this manner. If he had a wife and children, a third was to go to the wife, a third to the children, and the other third was to be at his own diſpoſal. If he left no will, the wife and children were to take their thirds, and the adminiſtrator diſtribute the other third. If there were no children, the widow had half, and the other was to be at his own diſpoſal; or, if he died inteſtate, at the diſpoſal of the adminiſtrator; the ſame if he left children, but no wife. The children were all to take equally, unleſs the father had ordered it otherwiſe in his will. If the child died, then his ſhare was to go to his children, if he had any. Thus was the law of diſtribution, which had been ſubject to much doubt and difference of opinion and practice, in a fair way of being aſcertained, if this ſcheme of reformation had ever taken place; for it is laid down, that even in caſe of a will the children were intitled to a third, or a half, which was to be divided equally between them; but the father might, if he pleaſed, apportion that third, or half, between them as he liked.

THEY went on to declare, that no ſon ſhould be paſſed over in his father's will, unleſs he was expreſsly diſinherited in plain terms; and ſuch diſheriſon would not be good, unleſs it mentioned ſome juſt cauſe for ſuch a meaſure. Theſe cauſes were thus enumerated by our legiſlators: if

† Vid. ant. 80. ‡ Vid. ant. 79.

a ſon

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

a ſon had laid violent hands upon his father; if he had injured him in any ſignal manner; if he had proſecuted him for a crime, through malice, and not for the good of the ſtate; if he had laid ſnares for the life of his father or mother; committed inceſt with his ſtep-mother, or father's concubine; if he had calumniated his father's good name, or waſted his property; if he had refuſed to be ſecurity for his father. A daughter might be paſſed over in a will, if ſhe had become a common proſtitute while the father was offering her a reputable marriage; for if a father neglected his daughter till ſhe was twenty-five years old, without preparing her a proper match, this omiſſion in the parent would abſove the daughter, ſay theſe reformers, from any imputation of offence, ſo as to preclude him from putting her out of his family, or paſſing her over in his will.

In like manner, a wife was not to be excluded from the huſband's will, without ſome delinquency on her part; as if ſhe had uſed violence againſt him; had contrived any ill againſt him; had attacked his fame or fortune by calumny and falſe accuſations; had expoſed his daughter to temptations; or had abſented herſelf from him. Both wives and children, if they obſtructed the father and huſband in making or altering his will; if they did not protect him when afflicted with diſeaſe, nor ranſom him when captured; or if they became heretics; they might be paſſed over, as objects unworthy to enjoy any part of his property.

They declared that the following perſons ſhould not be qualified either to become executors, or to take any benefit under a will: heretics; thoſe condemned to death, perpetual exile, or impriſonment; thoſe who kept concubines; thoſe who had two wives, or two huſbands; thoſe convicted of procuring or publiſhing *libelli famoſi*; procureſſes and common proſtitutes, and uſurers; and the delinquency of the above perſons was not to be eſtimated at the

the time of making the teſtament, or the death of the teſtator, but at the time of taking the executorſhip, or receiving the legacy [g].

THERE had always been a latitude in the deſcription of perſons to whom the ordinary was to commit adminiſtration. We have ſeen [h], that this was reduced to ſome ſort of preciſion by a ſtat. of Hen. VIII. and the intended regulation ſeems to have this laſt proviſion in view. For it ſays, that when a perſon died inteſtate, the wife ſhould be the firſt to have the adminiſtration; in the next place, thoſe who were neareſt of blood; and if the judge pleaſed, he might unite theſe with the wife in the adminiſtration. If there were ſeveral in the ſame degree of propinquity, the judge was at liberty to appoint one or more as he pleaſed.

SEVERAL directions are given for the granting of adminiſtration, the payment of legacies, the fees of ordinaries, and the like; moſt of which ſeem to correſpond with the practice of the eccleſiaſtical court in former times: and finally this new ſcheme directs, that in all matters of controverſy, upon the numberleſs queſtions to which wills were liable, and which were not here aſcertained or provided for, recourſe ſhould be had to the body of Imperial law.

THE other great object of eccleſiaſtical cogniſance, the payment of tythes, does not ſeem to have undergone any conſiderable change in this intended reformation; the compilers appear to have proceeded, in what they ordained, wholly upon the ideas of our provincial conſtitutions, many of which are copied almoſt in the very words. Among other regulations, it requires the late ſtatute of Ed. VI. [i] concerning the payment of tythes, and the old act about *ſylva cædua*, to be obſerved [k]. There is only

[g] Reform. Leg. Eccle. 129 to 135.
[h] Vid. ant. 206.
[i] Stat. 2 and 3 Ed. VI. c. 13. Vid. ant. 458.
[k] Reform. Leg. Eccle. 105, 106 to 124.

one

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

one more article of eccleſiaſtical juriſdiction which we ſhall mention, and that is *fidei læſio*, that has been ſo often conſidered in the various diſputes between the ſpiritual and temporal courts *. It ſeems to have been intended by the reformers, that no conſideration ſhould be had of the object in queſtion; but that, whether it was of a lay or a clerical nature, ſuit for the breach of faith ſhould be entertained in this court. They declare, that whatſoever agreements and promiſes were not fulfilled nor performed, whether there was an oath taken by the parties, or only a ſtrong affirmation made, thoſe who did not keep their faith ſhould be purſued with eccleſiaſtical cenſures, and compelled to make ſatisfaction to the parties who were deceived by their perfidy. [m].

WITHOUT entering any further into the detail of this projected reformation of our eccleſiaſtical law, it may ſuffice to ſubjoin a brief enumeration of ſuch cauſes as they meant ſhould be conſidered as eccleſiaſtical, and to be heard and determined no where but in this court: cauſes beneficiary, matrimonial, and of divorce; cauſes teſtamentary, and for the adminiſtration of inteſtates, effects; for ſubtraction of legacies, mortuaries, tythes, oblations, and other eccleſiaſtical rights; for uſury, hereſy, inceſt, adultery, fornication, ſacrilege, perjury, blaſphemy, *fidei læſio*, defamation, and ſcandal; laying violent hands on a clerk; diſturbance of divine ſervice; for correction and reformation of manners; accounts of churches and church-wardens [n]; dues owing to churches and their miniſters; reparation and dilapidation of churches' church-yards, and other eccleſiaſtical edifices. In theſe cauſes, and their incidents ariſing from or depending upon them, and in all other cauſes relating to the correction of ſins, the eccleſiaſtical judge, and no other, was to have juriſdiction to hear and determine [o].

* Vid. ant. 98.

[m] Reform. Leg. Eccle. 208.

[n] *Computus eccleſiarum et œconimorum.*

[o] Reform. Leg. Eccle. 195.

No

No period in the Engliſh hiſtory furniſhes more inſtances of an irregular and undefined conſtitution than the reigns of Edward VI. and Mary. Many of the extravagant proceedings of Hen. VIII. are rather to be attributed to wilfulneſs, and a tyrannical ſpirit. Theſe incentives no longer operated; yet, under the gentle ſway of his ſon and the Protector, the ſame prerogatives were exerciſed, with no other difference than that of their motives and objects. The acts of the council ſeem to have been received with the ſame acquieſcence as thoſe of Henry; and the commons, tho' not held in the ſame awe as during his reign, did not however ſhew greater ſpirit in aſſerting their privileges, or diſcover any better ſenſe of what extent thoſe privileges were.

King and government.

So prevailing was the opinion of the great prerogative poſſeſſed by our monarchs at this time, that the Scots made it one of the principal objections to marrying their young queen with Edward VI. that all their privileges would be ſwallowed up by the great prerogatives of the Engliſh crown. This notion had ſo ſpread abroad, that the emperor, in converſation with the Engliſh ambaſſador, maintained the king of England's prerogative to be greater than that of the king of France.

The firſt act of the regency appointed by Henry VIII. was to alter the government which that king, under authority of an act of parliament, had made by his will. They delegated all their power to the duke of Somerſet, under the title of Protector. This, however, was thought not ſufficient foundation for his authority; and a patent was procured from the young king, by which this revolution was conſidered as completely confirmed and legal. The duke was thereby inveſted with regal power, and a council was appointed, with whom he was to adviſe. This uſurpation was acquieſced under by parliament and the nation, without any ſcrutiny into its validity.

The

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

THE act of Henry which gave the force of laws to the king's proclamations, was made to have force during the young king's minority. Of this the Protector availed himself; and proclamations were iſſued on many occaſions, where they could be applied to promote the great deſign of the Reformation. By one proclamation the juriſdiction of the biſhops was ſuſpended; while commiſſioners were appointed, part clergy and part lay, to make a general viſitation in every dioceſe. After this law had been repealed [p], the Protector ſtill iſſued proclamations, which, in their nature, could hardly be conſidered as leſs than new laws; ſuch as forbidding many ancient ſuperſtitions, and making material alterations in the national worſhip.

PROCLAMATIONS had, from very early times, been the uſual method by which our kings had ſignified their commands, and enforced their authority. They were framed for the purpoſes of government and of the ſtate. They ſeemed a neceſſary part of the executive magiſtrate's power; and having grown up with the monarchy, they might in thoſe times be looked on with reverence by the people, without diſcovering how nearly they approached to acts of legiſlation. But the diſpenſing with poſitive laws was an act of a more unequivocal kind; and this power was exerciſed by Edward VI. or rather by the Protector, in more inſtances than one. The Protector procured a patent, enabling him to ſit upon the throne, and enjoy thoſe honours and privileges uſually beſtowed on princes of the blood: this was a plain diſpenſation with the ſtatute made in the laſt reign to ſettle precedency [q]. On another occaſion, when the convocation found themſelves reſtrained in their debates by the ſtatute of the ſix articles, the king granted them a diſpenſation of that law before it was repealed, as was actually done ſoon after [r].

[p] By ſtat. 1 Ed. VI. c. 2. [q] Vid. ant. 223. [r] Hum. vol. IV. 308.

THE

THE laſt act of this king's reign had an extraordinary appearance: he was prevailed on to alter the ſucceſſion of the crown (founded on an act of the laſt, and confirmed by one of the preſent, reign) by patent. The judges were required to draw an inſtrument to this effect; but knowing the penalty of treaſon was denounced on thoſe who aided in changing the ſucceſſion, they at firſt refuſed. The king ſaid he meant it ſhould be ratified by parliament; which, no doubt, would have been accompliſhed, if the king had ſurvived long enough [s].

AT the beginning of this reign the biſhops were conſtrained to take out new commiſſions, of the ſame kind as thoſe they had in the latter part of the laſt reign; by which they ſubmitted to hold their biſhopricks during the king's pleaſure, and were to exerciſe the epiſcopal function as his delegates, in his name, and by his authority [t]. This alteration was deſigned to forward the Reformation, by keeping in dependence thoſe biſhops who ſtill adhered to the old ſuperſtition.

UPON occaſion of the inſurrections about incloſures, and other ſubjects of complaint among the people, *Somerſet*, who always aimed at popularity, appointed a new ſort of commiſſioners, whom he ſent every where with unlimited power to hear and determine all cauſes about incloſures, highways, and cottages [u]. This created ſome clamour among the gentry, who looked on it as illegal and arbitrary. It was in the ſame ſpirit that *Somerſet* had erected a court of requeſts in his own houſe, for the relief of poor ſuitors [x]. There he uſed to hear complaints; and, in conſequence of what paſſed there, it ſometimes happened that he would intercede with the judges in matters depending before them. This raiſed more ſcandal than the commiſſion above-mentioned; and though he by ſuch

[s] Hum. vol. IV. 363.
[t] Burn. Ref. vol. II. 5.
[u] Hum. vol. IV. 329.
[x] Ibid. 335.

means

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

means grew into great favour with the populace, he drew upon himself a proportioned degree of odium from the nobility, who soon shewed him how able they were to defeat all the support he might hope from the people.

WITH so many precedents of extraordinary prerogatives before her, it cannot be wondered that Mary, who had in contemplation to abolish the late innovations, should make use of such ready instruments to effectuate it. Governed as she was by a natural sourness of temper, heightened by her bigotry to the catholic religion, it is not more surprising that such designs were followed with many oppressive acts of sovereign authority.

To supply the scantiness of her parliamentary grants, Mary revived the irregular method of raising money by loans; projects which there had been no need of attempting during the reign of Edward. She levied at one time, in this way, 60,000l. upon a thousand persons, who, she thought, would most readily comply. At another time, she levied the same sum on 7000 yeomen, and 36,000l. on the merchants. She published a proclamation, prohibiting, for a certain time, the exportation of cloths; intending by this practice to induce such to comply, whose interest would be thereby affected in the foreign markets [x]. She used to levy subsidies, granted by parliament, before the stated time. She issued privy-seals for the same purpose of raising money; and seised corn to victual her ships, without paying for it.

PROCLAMATIONS of an arbitrary import were often issued. One of these was, to enjoin those whose circumstances had been affected by the loans, and who on that account had discharged some of their servants, to take them back to their service, because they had become vagrants and thieves [y]. Others were issued against books of sedition, treason, and heresy. Those who had any of these

[x] Hum. vol. IV. 423, 424. [y] Id. Ibid.

books,

books, and did not presently burn them, without reading or shewing them to any person, it was declared by proclamation should be esteemed *rebels*, and without any further delay should be executed by martial law [z].

As an auxiliary to the bishops' court, a special commission was appointed by the queen's prerogative, with extraordinary powers. It consisted of twenty-one persons, and any three had the authority of them all. The commission says, "That since many false rumours were "published among the subjects, and many heretical "opinions were also spread among them; therefore the "commissioners, or any three of them, were to make en-"quiry, either by presentment, by witnesses, or any "other *politic* way they could devise; and to search after "all heretics, the bringers in, the sellers, or readers of "all heretical books. They were to examine and punish "all misbehaviour or negligences in any church or cha-"pel; and to try all priests that did not hear mass, or "come to their parish-church to service; that would not "go in procession, or did not take holy bread or holy wa-"ter: and if they found any that obstinately persisted in "such heresies, they were to put them into the hands of "the ordinaries, to be proceeded against according to law; "giving them full power to proceed as their discretions "and consciences should direct them, and to use all such "means as they could invent for the searching of the pre-"mises; empowering them also to call before them such "witnesses as they pleased; and to force them to make "oath of such things as might discover what they sought "after [a]."

New commissions.

INSTRUCTIONS were also given to justices of the peace, "That they should call secretly before them one or two "honest persons within their limits, or more, at their dis-"cretion, and command them by oath or otherwise, that

[z] Hum. vol. IV. 419. [a] Burn. Ref. vol. II. 323.

"they

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

"they ſhall ſecretly learn and ſearch out ſuch perſons as "ſhall evil-behave themſelves in church, or ſhall deſpiſe "openly by words the king's or queen's proceedings, or "go about to make any commotion, or tell any ſeditious "tales or news; and alſo that the ſaid perſons, ſo to be ap-"pointed, ſhall declare to the ſame juſtices of the peace "the ill-behaviour of lewd diſorderly perſons, whether it "ſhall be for uſing unlawful games, or ſuch other light "behaviour of ſuch ſuſpected perſons. And that the ſaid "information ſhall be given ſecretly to the juſtices; and "the ſame juſtices ſhall call ſuch accuſed perſons before "them, and examine them, without declaring by whom "they were accuſed. And that the ſame juſtices ſhall, "upon their examination, puniſh the offenders according "as their offences ſhall appear upon the accuſement and "examination, by their diſcretion, either by open puniſh-"ment or by good abearing [b]." Thus were juſtices directed to ſtretch the limits of their juriſdiction, in order to puniſh facts which were no crimes, after a trial authoriſed by no law.

To carry the execution of theſe deſigns ſtill further, letters were written to the *Lord North*, and others, to put ſuch obſtinate perſons as would not confeſs, to the *torture*, and there to order them *at their diſcretion*; and a letter was written to the lieutenant of the Tower to the ſame effect. Whether this pretended obſtinacy was a concealing of heretics, or of the reporters of falſe news, does not appear. Whatever the pretence was, the putting people to the *torture*, becauſe they were thought obſtinate and would not confeſs; and the leaving the degree of it to the diſcretion of thoſe appointed for their examination; were great ſteps towards the moſt rigorous part of the proceedings of the inquiſition [c].

[b] Burn. Ref. vol. III. 247. [c] Ibid. 243.

WHILE

WHILE informers and ſpies were encouraged, the priſons were filled with perſons of all deſcriptions, who had incurred the diſpleaſure of the court. When ſome of Mary's oppreſſions in raiſing men and money had created an uneaſineſs and clamour in the nation, ſhe endeavoured to prevent ſuch ill-humours from getting to any height, by throwing into the Tower ſome of the moſt conſiderable gentry. That ſuch priſoners might not be known, they were, ſome of them, carried thither in the night-time; others were hood-winked and muffled by the guards who conducted them [d]. To prevent any one from daring to reflect on ſuch proceedings, ſhe ſtruck a terror into the houſe of commons, always obedient enought to the court, by impriſoning their members for freedom of ſpeech: and when ſome had ſeceded from parliament, ſhe directed them to be indicted for it in the king's bench [e].

THE few trials for offences which have come down to us, muſt be taken as evidences of the practice of our courts in thoſe times, and, as ſuch, are very ſtriking events in the hiſtory of our law.

Trial of the duke of Somerſet.

THE proceedings againſt the duke of Somerſet in the reign of Edward VI. are worthy of notice. The indictment was for treaſon and felony. Upon the trial, the proſecution was ſupported, as uſual, by depoſitions, without confronting one witneſs with the priſoner; a conduct which was at length thought ſo extremely repugnant to common juſtice, as to become the immediate cauſe of ſtat. 5 and 6 Ed. VI. which we have already ſo often mentioned. This proſecution is on other accounts worthy of obſervation. The duke was acquitted of the high-treaſon; and that part of the indictment is held by lord Coke to be ill, becauſe the overt act was laid only generally. The other part was grounded upon the late ſtatute 3 and 4 Ed. VI. c. 5. which made it felony to call

[d] Hum. vol. IV. 432. [e] Ibid. 403. Vid. ant. 203.

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

together perſons to the number of twelve, with the intent to commit certain acts of violence therein mentioned; among which, that of impriſoning a privy-counſellor is one. The charge was, for attempting in this manner to impriſon the earl of Warwick.

THE common ſtories of this proceeding inform us, that he was acquitted of the treaſon, and found guilty of the felony; ſo it is related in king Edward's journal; and he was upon that attainder beheaded. Lord Coke remarks upon this attainder and execution, that the truth concerning it is contrary to ſome of our chronicles, and the vulgar opinion; and *in ſome points contrary to law.* Firſt, as to the notion that he was wrongfully executed, and ought, by law, to have had his clergy; he ſays, that clergy is expreſsly taken away by this ſtatute. Secondly, as to the opinion that he was indicted on ſtat. 3 Hen. VII. c. 14. for going about to *procure the death* of the earl of Warwick; he ſays, he was indicted for endeavouring to *take and impriſon* that nobleman, as plainly appears from the indictment [f]. Again he remarks, that being attainted but for felony, he could not, by law, be beheaded [g]. Thoſe who thought the duke was wrongfully deprived of his clergy, or rather (as it was ſaid) that he never demanded it, and that it was not to be granted by the court but upon prayer, founded their remark upon a ſuppoſition that the indictment was upon the above-mentioned ſtatute of Henry VII. which makes that offence only ſingle felony.

Of Sir Nicholas Throckmorton.

On the trial of *Sir Nicholas Throckmorton*, in the next reign, the counſel for the crown proceeded in reading confeſſions of abſent perſons, and putting the priſoner to anſwer to them ſeverally, as they were read. This kept him conſtantly engaged, through the whole trial, in a ſort of altercation with the crown-lawyers; whoſe de-

[f] Coke's Ent, 3 Inſt, 13. [g] 3 Inſt, 12, 13.

portment,

portment, it ſhould ſeem, very ill correſponded with the decorum to be obſerved on ſuch occaſions. Only one of the deponents was produced, and that was to ſwear him to the truth of his depoſition. The priſoner did not object to this mode of proof, any otherwiſe than that ſince ſtat. 5 and 6 Ed. VI. there ſhould be two witneſſes to prove a treaſon; which remonſtrance, for reaſons which have been conſidered, was on this and all other occaſions diſregarded [h]. The only witneſs produced to give evidence *vivâ voce*, was called by Throckmorton himſelf, and was rejected by the court.

The priſoner, who was very able to cope with the lawyers on the part of the proſecution, prayed that he might have the uſe of a ſtatute-book; which was denied him, notwithſtanding he preſſed on them the plain injunction of the queen, lately delivered to her judges, to adminiſter juſtice indifferently. He alſo reminded them of her direction, that, in criminal proſecutions, they ſhould break through the ancient uſage; and always hear witneſſes examined in behalf of priſoners, as well as againſt them. The harſhneſs he experienced both from the bench and the counſel, had not the intended effect; but, on the contrary, perhaps prejudiced the jury in favour of an oppreſſed man: they acquitted him of the indictment. But the virulence of the proſecutors did not end here; for other circumſtances, that deſerve to be remembered, attended this tranſaction. The attorney-general, after the acquittal, prayed the court that the jury might be bound in recogniſances to anſwer for their verdict. They were ſoon after fined and impriſoned by a ſentence in the ſtar-chamber: they were to pay one hundred marks a-piece, and to be impriſoned till further order. It was ſome months before they were releaſed, and then not without paying different compoſitions, according

[h] Vid. ant 494.

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

to the value of their effects; which had, in the mean time, been all inventoried and appraiſed by the ſheriff for the purpoſe [i]. Such was the ſecurity which might be repoſed in this boaſted privilege of trial by a jury of equals; and ſuch the perils under which a jury exerciſed its own judgment, in oppoſition to the inclinations of the ſovereign. During the reign of the ſtar-chamber, the perſons of jurors were no more exempted from animadverſion than thoſe of common individuals; every thing was reduced to the ſame level of ſubordination.

Bills of attainder.

THE proceedings againſt *lord Seymour*, in the reign of Edward VI. ſhew how the opinions of men were now altered reſpecting bills of attainder. Articles were drawn up againſt that nobleman; which, it appears by the council-book, were fully proved by witneſſes, and by letters under his own hand. He was ſent to and examined by ſome of the council; but he refuſed to give any *direct* anſwer, or to ſign ſuch as he had given. It was then reſolved, that the whole council ſhould go to the Tower and examine him. When they attended him, the anſwer he made was, that he expected an open trial, and his accuſors to be brought face to face. After this fruitleſs attempt, it was determined to proceed in a parliamentary way. Accordingly a bill was brought into the houſe of lords for attainting him of treaſon. This the peers eaſily paſſed, in the manner they had been accuſtomed to in the reign of Henry VIII. However, ſome ſhew of juſtice was obſerved. All the judges and the king's counſel delivered their opinion, that the articles were treaſon: then ſome of the lords were produced as witneſſes, who gave their teſtimony ſo fully, that all the reſt with one voice aſſented to the bill.

WHEN the bill was ſent to the commons, it was accompanied with a meſſage, that, if they deſired to proceed as the lords had done, ſuch of them as had given evidence

[i] Sta. Tri. vol. I. p. 78.

before

before the upper-houſe, ſhould come down and declare it to the commons. In this houſe the bill met with ſome oppoſition. Many argued againſt attainders in the party's abſence: they ſaid it was a ſtrange way of proceeding, that two or three peers ſhould riſe up in their places, and ſay ſomewhat to the ſlander of another, and that he ſhould be thereupon attainted. It was preſſed, therefore, that there ſhould be ſomething like a trial; that the lord-admiral ſhould be brought to the bar, and be heard for himſelf. But here the king interpoſed; and informed the commons by meſſage, *that there was no neceſſity of ſending for the admiral.* The commons, as uſual, gave ready obedience to the pleaſure of the court, and paſſed the bill with four hundred voices for it, and not more than ten or twelve againſt it[k]. However, a view of this proceeding againſt lord Seymour ſhews, that this extraordinary way of condemning was not entirely reliſhed by the parliament.

AFTERWARDS, when the bill of attainder of miſpriſion of treaſon againſt *Tunſtall* biſhop of Durham was ſent by the lords to the commons, with all the evidences, which were depoſitions exhibited to the lords, the commons reſolved to diſcountenance ſuch a practice, and would not, at that time, proceed upon it. At another day, they ordered the privy-counſellors in their houſe to move the lords, that his accuſors and he might be brought face to face (from which we may conclude, that the examinations which produced the depoſitions had been, as they generally were, *ex parte* in the ſtar-chamber); but that not being complied with, *they would not paſs the bill*[l].

IN the reign of queen Mary, the attainder of the *duke of Norfolk*, which had paſſed in the latter end of Henry VIII. was repreſented as null and void; as well on account of other informalities, as *becauſe* no ſpecial matter was alledged againſt him, except the wearing of a coat of arms

[k] Burn. Ref. vol. II. 93, 94. [l] Ibid. 185.

which

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

which his anceſtors had, many years before him, worn without offence [m]. However ſanguinary this reign was in criminal proceedings for hereſy, the court never received any aſſiſtance in its ſchemes of reſentment from the parliament; which paſſed no bills of this kind, except the following may be conſidered in that light.

THE ſtatute of Edward VI. which took away clergy from principals in murder, had left acceſſaries to enjoy the impunity they derived at common law from the benefit of clergy. It happened in 3 and 4 Phil. and Ma. that one *Rufford* had hired two perſons to murder one *Bennet Smith*. This is ſaid by the act in queſtion, to be one of the moſt deteſtable murders ever known in England. The wife of Rufford petitioned the houſe of commons, that Smith might by act of parliament be deprived of his clergy. Upon this, the commons ſent to the queen, praying that ſhe would order Smith to be brought from his confinement in the Tower to the bar of the houſe. He was accordingly brought, when the other parties confeſſing the whole of the matter, Smith, at length, doing the ſame, the bill was paſſed. But when it was ſent up to the lords, it was there ſtrongly oppoſed, particularly by the clergy, who would not readily conſent to any diminution of their antient privileges: however, at laſt it got through that houſe, and received the royal aſſent. The next year, we have ſeen, there was a general law made, taking clergy away from acceſſaries before the fact, in murder, and other crimes [n].

THERE had been before, in this reign, an inſtance of an *ex poſt facto* law. It being ſuggeſted to the parliament, that the congregations in the city had prayed God to convert or confound the queen; it was thereupon enacted, that whoſoever *had* ſo prayed, or ſhould ſo pray in future, ſhould be taken for a traitor.

[m] Hum. vol IV. 374. [n] Stat. 4 and 5 Ph. and Ma. Vid. ant. 491.

THE

THE principal oppreſſions in theſe two reigns, whether by ſummary and illegal trials, by impriſonment, confiſcation, execution, or otherwiſe, were occaſioned by the alterations in religion; and theſe were carried to extraordinary, tho' not to equal, lengths, both by proteſtants and catholics, according as each party had, in its turn, the aid of the executive power.

Judicial proceedings on account of religion.

IN the reign of Edward VI. when the king's councils, in matters of religion, were principally directed by the candid and gentle ſpirit of *Cranmer*, the government was ſometimes tranſported, by zeal for their new opinions, beyond the bounds of moderation.

The proceedings againſt *Gardiner, biſhop of Wincheſter*, were very ſevere, and on very ſlight grounds. He had been enjoined by the council to inculcate, in a ſermon, the duty of obedience to a king during his minority. He neglected to comply with this; and had, on that account and no other, been thrown into priſon, where he lay two years. At the end of that period, the lord-treaſurer and other privy-counſellors went to him at the Tower, and preſented him with certain articles, containing moſt of the points of the reformed religion, to which they required his aſſent. With all theſe he promiſed an entire compliance, if he was ſuffered to be at large, excepting only one article, which contained an acknowledgment of his own delinquency: but they perſiſted in requiring his ſubſcription abſolutely to the whole. He ſtill refuſed. Upon this the income of his biſhopric was ſequeſtered, and he was required to conform himſelf to their orders within three months, under pain of deprivation, and being confined to a cloſet cuſtody.

ALL this was much cenſured at the time, as illegal and inquiſitorial. A man ſhut up in priſon upon a complaint only; and without any further enquiry, after two years, required to give his aſſent to articles of faith! However, ſome reaſoning from the canon law, and the way of proceeding

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

ceeding *ex officio*, were thought to give a colour to this tranſaction; and in ſome degree to excuſe, if not to juſtify, the hard meaſure this prelate ſuffered [o].

At the end of three months, a commiſſion was directed to ſome biſhops and others, clergy, laymen, and lawyers, to try Gardiner. As there had been no regular charge at firſt, this was a ſhort buſineſs. He appealed from the commiſſioners to the king, objecting to this tribunal as illegal. The appeal was diſregarded, and ſentence of deprivation was paſſed upon him by the commiſſioners. His books and papers were ſeized; he was ſecluded from all company; and was not allowed to ſend or receive any letters or meſſages [p]. Tunſtall and other biſhops were deprived by commiſſioners of the ſame kind; which prelates were all again reſtored by a like act of power in the reign of Philip and Mary, by a ſentence of commiſſioners appointed to review the proceſs and condemnation [q]; and the ſentence was juſtified, as under a regular proceeding *ex officio*.

The method of proceeding in the biſhops' court for hereſy, was, to the laſt degree, oppreſſive and inſidious. They uſed to exhibit to the accuſed perſon certain articles, conſiſting of ſuch points of faith which they knew he had his doubts about, or was reputed to deny; and if he did not declare his aſſent to them, there was an end of the enquiry: he was condemned and executed.

There were two executions for what was called hereſy, in the reign of Edward VI. Theſe ſufferers were anabaptiſts; but thoſe in queen Mary's reign were ſo numerous, as to render the ſhort time in which this perſecution raged, one of the bloodieſt in the hiſtory of the church. The cruelties exerciſed on the living have filled volumes with melancholy relations; but the proſecution of the dead, which was inſtituted by the viſitors of the univerſity of Oxford, is a ſingular piece of legal proceſs.

[o] Burn. Ref. vol. II. 144. [p] Hum. vol. IV. 345. [q] Ibid. 375.

Bucer

Bucer and *Fagius*, two foreign reformers, there buried, were cited, in the true ſpirit of the canon law, to appear and defend themſelves; and after three citations, the dead bodies not riſing to ſpeak for themſelves, and none coming to plead for them, for fear, as *biſhop Burnet* obſerves, of being ſent after them, the viſitors proceeded *ex parte*. They examined witneſſes concerning the hereſies they had taught, and adjudged them obſtinate heretics; ordered their bodies to be taken out of their graves, and to be delivered over to the ſecular arm. A writ iſſued out of chancery for the execution of this ſentence; their bodies were taken up, and, being carried in coffins, were tied to the ſtakes, with many of their books and heretical writings, and all burnt together [r].

THE deciſions of courts in the reigns of Edward VI. and queen Mary, are to be found in *Dyer*, who reports all through theſe two reigns; as alſo do *Benloe* and *Daliſon*. Some few caſes are to be found in the collectors *Jenkins* and *Keilway*; ſome in *Moore*; and a few, but thoſe very important, in *Plowden*. There are ſome caſes of theſe two reigns in *Leonard*, and ſome towards the latter end of Philip and Mary in *Owen*.

STAUNFORDE'S *Pleas of the Crown* was the firſt work which treated the ſubject of criminal law profeſſedly, and in detail. This book is written in French: the method of it is perſpicuous, and the matter diſpoſed with learning and accuracy. The author is uncommonly full in his quotations; the ſtatutes are generally given at length; and whole pages are frequently tranſcribed from *Bracton*. Notwithſtanding the alterations we have ſeen the criminal law undergo ſince the reign of Henry III. yet Staunforde has ventured perpetually to recur to this ancient writer as an authority, and has condeſcended to take from him many complete chapters. This is in general done with ſucceſs and propriety; though ſometimes his author has failed

Staunforde.

[r] Burn. Ref. vol. II. 321.

him;

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

him; as, among other inſtances, may be obſerved of Bracton's definition of larceny, which, as we before obſerved, was not law at the time Staunforde wrote *.

In the account which this writer gives of crimes, his method is to begin by ſtating what they were in *Bracton's* time, and then to add the ſubſequent deciſions which had affected the old law: at other times he entirely relies on his favourite author. This is done in a compendious way, without enlarging much on any parts of the ſubject. On the whole, he ſeems to aim at nothing more than digeſting in a clear manner what could be collected from others.

As Staunforde has the praiſe of being our earlieſt writer on pleas of the crown; ſo has his merit been acknowledged by thoſe who have followed him in the ſame walk; they having, in general, adhered to the arrangement and diviſions of his work. He divides his ſubject, as falling under three conſiderations: firſt, of crimes; next, of the method of bringing delinquents to juſtice; and laſtly, of trials and puniſhment. The ſeveral titles into which theſe are ſubdivided, have furniſhed the heads of every book which has been written ſince his time, on the ſame ſubject. This treatiſe is not voluminous; and when the quotations out of Bracton, and the ſtatutes, are taken from it, the book is diminiſhed more than half.

We cannot but feel a ſecret pleaſure when we find an author, to whom we have before been under ſuch obligations, in repute with a judge of eminence and learning upon points of modern practice. After the lapſe of three centuries, it was hardly to be expected that we ſhould be called upon to renew our acquaintance with Bracton; and Staunforde is intitled to our acknowledgment for the ſtrong teſtimony he has given in later times to the intrinſic merit of this father of the Engliſh law. Bracton ſeems to have been a great authority with *Staunforde*; for it appears from the reports, that he ventured to cite and argue from him upon the bench, at a time when it was the faſhion to con-

* Vid. ant. 538.

ſider

ſider Bracton and Glanville not as authors in our law, but to be quoted, if at all, only for ornament in diſcourſe [s]; and for conſonancy and order, where they agreed with better authorities [t].

Printing of law books.

THE preſs was not idle during theſe two reigns, but produced ſeveral works of uſe to the practiſing lawyer. William Raſtell publiſhed, in 1559, a collection in Engliſh, of the ſtatutes now in force, from *Magna Charta* to the 4th and 5th of Philip and Mary [u]. In 1553, there came out an abridgement of the book of aſſiſes [x].

THOMAS BERTHELET, who had a patent of the office of king's printer for life, died in 1555. After this, in 7 Ed. VI. there is found a ſpecial licence to Richard Tathile (or Tottel, whoſe name like many others of this time was variouſly ſpelt), for him and his aſſigns to print for ſeven years all manner of books of the temporal law, called the common law, ſo as the copies were allowed and judged proper to be printed by one of the juſtices, or two ſerjeants, or three apprentices of the law, one of whom was to be a reader in court; and no one was to print what *he* had firſt printed, under pain of forfeiture of ſuch books. A licence for the ſame term was alſo granted him in 2 and 3 of Ph. and Ma.; and in 1 Eliz. he had a ſimilar licence for his life [y]. By Tottel, and by other printers, in theſe two reigns, moſt of the books printed in the reign of Henry VIII. were reprinted; but ſuch different editions would be too tedious to enumerate.

[s] Plowd. 357, 358.

[t] Such is the manner in which *Saunders* and *Catline* deliver themſelves, in the argument of *Stowell verſus lord Zouch*, in the 11th of Elizabeth. Such a judgment upon theſe antient writers might be very diſcreet and juſt at the time; but I was aſtoniſhed to find Fitzherbert inform us, that it was agreed by the whole court in 35 Hen. VI. that Bracton was *never* taken for an author in our law. It was a pleaſure to diſcover that the Year-book had given him no warrant for this monſtrous opinion. The readers of Abridgements have been long aſperſing the reputation of Bracton with more ſucceſs than authority.

[u] Typ. Antiq. 474.

[x] Ibid. 810.

[y] Orig. Jurid. 59, 60. Typ. Antiq. 806.

The

The editions, however, of such books as had never before reached the press, are worthy of notice. Among such are the following: In 1555, was printed by Tottel, a book intitled, *Anni Regis Henrici septimi*; containing some year-books of that king; respecting which he informs us, that the first and second were from a new collation; and that the 10th, 11th, 13th, 16th, and 20th, had never before been published [z]. Some time about 1553, was printed a tract of Sir John Fortescue with the following title, *De politicâ Administratione et Legibus civilibus florentissimi Regni Angliæ Commentarius* [a].

Miscellaneous facts.

In this age of reformation, an act was passed through the house of commons in 1549, for making some considerable alterations in the process of the common law; but it was thrown out in the house of lords. A long discourse on this topic of reforming the common law was written about this time, which *bishop Burnet* says he had seen. It is there complained, that the law of England was a barbarous kind of study, *and did not lead men into a finer sort of learning*; which made common-lawyers so unfit for negotiating foreign affairs. It was therefore proposed by this author, that the common and statute law should be digested into a body under titles and heads, and put into good Latin, in imitation of the Roman laws [b]; a proposal which, it should seem, was less necessary now than it ever had been, as *Fitzherbert*'s and *Rastell*'s works were new, and had at least made a great step towards a complete digest. The whim of imitating the Roman law so closely as to adopt its language, was taken up and executed by a writer in after-times [c]; the success of which performance is a more decisive answer to the above project, than many arguments of expedience and propriety.

[z] Typ. Antiq. 809.
[a] Ibid. 549.
[b] Burn. Ref. vol. II. 91, 92.
[c] Dr. Cowel's *Institutiones Juris Anglicani*, published in the reign of James I.

An order was made in the ſociety of the Inner Temple, in 3 and 4 Ph. and Ma. that thenceforth no attorney, or common ſolicitor, ſhould be admitted into that houſe without the aſſent and agreement of their parliament [d].

The grievance of long beards was not yet removed. We find an order was made in the Inner Temple, that no fellow of that houſe ſhould wear his beard above three weeks growth, upon pain of forfeiting twenty ſhillings [e]. In the Middle Temple, an order was made in 4 and 5 Ph. and Ma. that none of that ſociety ſhould wear great breeches in their hoſe, made after the Dutch, Spaniſh, or Almain faſhion, or lawn upon their caps, or cut doublets, on pain of forfeiting 3s. 4d.: for the ſecond offence, the offender was to be expelled.

In 3 and 4 Ph. and Ma. an order was made by the ſociety of Lincoln's Inn, that thenceforth none ſhould be admitted into that houſe, who had not been of an inn of chancery before, for the ſpace of one year, unleſs he paid forty ſhillings at admittance [f]. In 1 and 2 Ph. and Ma. a gentleman of Lincoln's Inn was fined five groats by a ſpecial order, for going in his ſtudy-gown in Cheapſide on a Sunday about ten o'clock in the forenoon, and in Weſtminſter-hall, in the term-time, in the forenoon [g].

In 3 and 4 Ph. and Ma. the following orders were agreed upon to be obſerved in all the four inns of court. That none of the companions, except knights or benchers, ſhould wear in their doublets, or hoſe, any light colours, except ſcarlet and crimſon; nor wear any upper velvet cap, or any ſcarf, or wings in their gowns, white jerkins, buſkins, or velvet ſhoes, double cuffs on their ſhirts, feathers or ribbons on their caps, on pain of forfeiting 3s. 4d. and for the ſecond offence, of expulſion. No attorney was to be admitted into any of the houſes: and in all admiſſions thenceforward this condition

[d] Dugd. Orig. 147. [e] Ibid. 148. [f] Ibid. 242. [g] Ibid. 243.

was

CHAP. XXXII.

EDW. VI. PHILIP and MARY.

was to be implied: that if he who was admitted practiſed *attorneyſhip* he ſhould be *ipſo facto* diſmiſſed, and have liberty to repair to the inn of chancery from whence he came, or to any one of them, if he were of none before. It was required, that none of the companies of ſuch houſes ſhould wear their ſtudy-gowns into the city any further than *Fleet-bridge*, or *Holborn bridge*; nor might they wear them as far as the *Savoy*, upon like pains as thoſe beforementioned. None of the ſaid companions, when in commons, might wear Spaniſh cloaks, ſword and buckler, or rapier, or gowns and hats, or gowns girded with a dagger on the back, upon the like pain.

THE moot-caſes in any of the houſes of court were not to contain more than two points for argument: they were to be brought in pleading, and the puiſne of the bench was to recite the whole pleading. None of the bench were to argue above two points; if any did, the Reader was to remonſtrate with him, and correct it in future. Every reader of a court of chancery was to give the ſame orders about apparel, weapons, and ſtudy-gowns, to his houſe of chancery. Among the ſame regulations it was ordained, that none of the ſaid companions, under the degree of a knight, being in commons, ſhould wear any beard above three weeks growth, on pain of forfeiting forty ſhillings, and double the ſum every week after monition [h].

[h] Dugd. Orig. 310.

FINIS.

INDEX.

The NUMERALS denote the VOLUMES; the FIGURES the PAGES.

ABATEMENT, pleas in, i. 460
Abjuration, i. 193. ii. 23.
Acceſſary, iii. 124. iv. 180. 539
Account, action of, ii. 73. 178. 337. iii. 75. iv. 388.
Accuſation, iv. 345.
Action, pleas to the, i. 475.
Actions, different ſorts of, i. 314.
—— perſonal, i. 488.
Additions, ſtatute of, iii. 257.
Admeaſurement, i. 343. 384. ii. 197.
Adminiſtration of Juſtice, ii. 114. 432. iii. 285.
Adminiſtrators, ii. 387. iv. 70.
Admiral, court of the, iii. 197.
Affinity, iv. 58.
Aids, feudal, i. 127. ii. 111. 372.
—— levying of, ii. 101. 104.
Aid prier, i. 439. ii. 142. iii. 443.
ALFRED'S DOMBEC; i. 25.
Alienation of land; i. 43. 103. 239. ii. 223. 307. 371. iv. 140.
Allodial and feudal, i. 5.
Amendment, ii. 347. iii. 469.
—— ſtatutes of, ii. 448. iii. 258. 278. iv. 266.
Amercements, i. 247. ii. 71. 130.
Amortiſement, ii. 230. 377.
Annuity, action of, ii. 258. iii. 74.
Ancient demeſne, iii. 230.
Appeal, i. 196. 251. ii. 154. 210. iii. 127. 186. 239 414. iv. 152. 181.
—— of homicide, ii. 25.
—— *de pace et plagis*, ii. 33.
—— *de plagis et mayhemio*, ii. 34.
—— *de pace et impriſonamento*, ii. 35.
—— of robbery, ii. 37.
—— of rape, ii. 38.
Appeal of provors, ii. 43.
Appeals, eccleſiaſtical, iv. 31. 105
Appearance in court, i. 114. iii. 281.
Apprentice of the law, ii. 284.
Archdeacon, iv. 6.
Argumentative pleading, iii. 430.
Arſon, i. 199. ii. 274. 351. iii. 285.
Aſſault and battery, iii. 85.
Aſſemblies, unlawful, iv. 475. 487.
Aſſignees of reverſions, iv. 508.
Aſſiſe of novel diſſeiſin, ii. 116. 204. 205. iii. 22. 202. 230. 276.
—— ſpecial, iii. 129. 280.
—— trial by, i. 85. 126.
—— in a writ of right, i. 125. ii. 314.
—— juſtices of, i. 244. ii. 425. iii. 200. iv. 306.
—— turned into a jury, i. 336. iii. 22.
Aſſiſes, book of, iii. 148.
Aſſumpſit, actions of, iii. 244. 394. iv. 171. 380. 527.
Attachments, i. 121. 481.
Attachiamentorum ſolennitas, i. 480. ii. 58. 59. 75. 124.
Attaint of jurors, i. 370. ii. 117. 434. iii. 276. iv. 142. 263.
Attainder, bills of, iv. 407. 564.
Attempt to commit felony, iii. 413. iv. 145.
Attornies, i. 169. ii. 169. 299. 304. iii. 234. 284.
Attornment, i. 281. iii. 358.
Augmentation, court of, iv. 257.
Bail and mainprize, i. 252. ii. 14. 131. 153. iii. 283. iv. 128. 154. 492.
Bailiwick, ii. 235. 402.
Bailment, ii. 333.
Bankrupts, iv. 254.

Bargain and ſale, iv. 162
Barrators, ii. 130
Baſtard eigné, iii. 2
Baſtardy, i. 117. ii. 445
——— ſpecial, i. 265. 464
——— plea of, i. 463
Beaupleader, ii. 70
Benevolences, iv. 109. 127. 184
Bigamy, ii. 143. iv. 471
Bill, proceeding by, ii. 250. iii. 93. 387
Biſhops, iv. 5
Bocland, i. 5
BRACTON, ii. 86. iv. 570, 571
BRITTON, ii. 280
Burglary, ii. 274. 351. iii. 123. iv. 178
BURGESS, Mr. on inſolvency, ii. 442. in the notes
Canon law, i. 66. 81. ii. 53. iv. 3
Capias, ii. 439
Capitula itineris, i. 202. ii. 4
Caſe, actions on the, iii. 89. 243. 391
Catholic religion re-eſtabliſhed, iv. 443.
Ceorls, i. 5
Certificate of aſſiſe, i. 376. ii. 206
Certificates of attainder, iv, 319
Challenge of a juror, ii. 243
Champerty, ii. 126. 212. 240. 243. 457. iv. 291.
Chancery, court of, i. 59. ii. 250
Charters, i. 10. 88. 448
Charters of liberties, i. 207
Chattels, iii. 15. 369
CHESTER, county-palatine of, i. 48. iii. 156. 241. iv. 204
Citation, iv. 12
Civil law, i. 68. 81. ii. 53
Clarendon, conſtitutions of, i. 73
Clergy, i. 69, 76, 79. ii. 77, 157, 215, 272, 291, 375, 388. iii. 137, 160, 220, 256
Clergy, benefit of, ii. 134, 272, 462. iii. 137, 138, 421. iv. 155, 306, 315, 452, 469, 470, 480, 485, 491
——— practiſing the law, ii. 90
——— ſubmiſſion of the, iv. 213
Cognation, iv. 56, 546
Coin, ii. 228, 399. iii. 214, 238, 261, 272. iv. 144
Colour in pleading, iii. 24, 438
Commiſſions extraordinary, iv. 557, 559
Common law, origin of the, i. 2
——— ſtudy of the, iv. 572
——— pleas, court of, i. 57, 244, 318. ii. 237
——— right of, i. 262. ii. 209
——— tenants in, iii. 351
——— prayer, iv. 439, 474
Compoſition for tythes, iv. 92
Compurgatores, i. 23
Conditional eſtates, i. 294. iii. 337
——— limitations, iv. 509
Confirmation, i 93, 94. iii. 355
Conſanguinity, iv. 57, 546
Conſpiracy, ii. 239, 242, 328. iii. 126
Conſtable and marſhal's court, iii. 194
Conſtitutions, legatine, ii. 78, 85
——— provincial, ii. 78, 79, 85, 276, 284. iv. 106
Conſultation, writ of, i. 456. ii. 217
Conteſtatio litis, iv. 14
Contracts and agreements, iii. 372
Conveyances among the Saxons, i. 10
Copyhold, i. 39. iii. 158, 312
Coroners, i. 202. ii. 12, 129, 140. iv. 154
Coſenage, writ of, i. 363. ii. 201
Coſts and damages, iii. 400. iv. 261
Council, judicature of the, i. 61. ii. 414. iii. 179, 227, 273
Count in a writ of right, i. 122, 427
——— of advowſon, i. 137
——— of dower, i. 145, 383
——— in dower, *unde nihil*, i. 378
Counterplea, iii. 447
Counties palatine, iv. 197
County court, i. 7, 47. ii. 149, 175, iv. 465
Courts, i. 316. ii. 246
Covenant, action of, ii. 262, 336. iii. 79. iv. 379
——— to raiſe a uſe, iv. 163, 353, 518
Crown, pleas of the, i. 128
Curia regis, i. 48, 317
Curteſy, eſtates by the, i. 298. ii. 165, 315, 323. iii. 334

Cut purſe, ii. 276
Damage feſant, ii. 51.
Damages, ii. 147. iii. 400
Darrein preſentment, i. 185. 348
——— pleas thereto, i, 186. 352
Deadly feuds, i. 19
Death of the king, &c. iv. 466
Debt, i. 158
—— proof of, i. 165
—— action of, ii. 256. 261. 329. iii. 58. iv. 388
—— in the ſteward and marſhal's court, ii. 252
Debtor of the king, i. 243
Deceit, ii. 329. iii. 393
Decennaries, i. 13. Vid. Frank-pledge
Declarations, forms of, iii. 425
——— in account, iii. 76
——— in annuity, iii. 74
——— in covenant, iii. 79
——— in debt, iii. 59
——— in detinue, iii. 66
——— in detinue, *de chartis reddendis*, iii. 73
——— in replevin, iii. 82
——— in treſpaſs, iii. 84
Decretum, iv. 20
Deeds, ii. 330. 445
Defaults, i. 417. ii. 71
Defence in pleading, iii. 428
Demi-mark, tender of the, i. 429
Demurrer, iii. 468
Departure in pleading, iii. 437
Denunciation iv. 37
Deſcent, i. 40. 106. 310. ii. 244. 246. 317. 400. iii 2, 3
——— in a writ of right, i. 431
——— that tolls an entry, iii. 16. iv. 236
Detinue, action of, ii. 261. 333. iii. 66.
Deviſe, ii. 8. iv. 240. 360
Dies communes in banco, ii. 56. iv 268
Dies datus partibus, ii. 60.
—— *amoris*, ii. 60
Defamation iv. 101
Dilationes, iv. 17
Diſclaimer, iii. 457.
Diſcontinuance, iii. 16. 20. iv. 466
Diſſeiſin, i 321. ii. 342. iii. 16. 27
Diſtreſs, i. 32 175. ii. 46. 66. 69. 112. 176. 234 iv. 463
——— proceſs of, i. 483
Divorce, iv. 62. 548
DONATIO MORTIS CAUSA, i. 306
Doomſday-book, i. 219
Double pleading, iii. 436
Dower, title to, i. 100. 241. 261. 312. ii. 306. 309. 318 iii. 332
——— forfeiture of, ii. 467. iv. 471
——— admeaſurement of, i. 384
——— writ of right of, i. 144. 383
——— *unde nihil*, i. 146. 378
——— days in writ of, ii. 60
Duel, trial by, i. 33. 82. 123. ii. 24. 314. iii. 134. 419
Ejectment, iii. 29. 390. iv. 165
Elections, freedom of, ii. 109
Elegit, writ of, ii. 187.
Embezzling goods by ſervants, iv. 283
Engliſhery, i. 17. 33. ii. 22 461
Entails, ii. 163, 318. iii. 4. 251. 320
—— barred, iii. 12. 326. iv. 135
Entail of a uſe, iv. 343
Entry congeable, iii. 16. 19
—— writ of, i. 339
——— different kinds of, i. 387. iii. 29
——— turned into a writ of right, i. 388
——— degrees in, i. 397. ii. 121
——— in the poſt, ii. 72. iii. 34
Equity, court of, in chancery, iii. 188. 274. 379 iv. 173. 368
———, in the exchequer, iii. 228
Eccleſiaſtical court, i. 63. 71. ii. 79. 215. 129. 383. iii. 256. 257. iv. 1. 46. 102. 205, 213. 398
——— offences, iv. 9
——— rights, iv. 8
——— ſuits, iv. 11. 46
Edicta, iv. 19
EDWARD THE CONFESSOR, his laws, i. 25.
EDWARD I. ii. 92. 276
EDWARD II. ii. 353
EDWARD III. iii. 141
EDWARD IV. iv. 108
EDWARD VI. iv. 555
Error, iv. 141.
—— in the exchequer, ii. 423

Escapes, ii. 125
Escheat, i. 119, 238. ii. 309, 310
Escheators, ii. 372, 376. iv. 231
Escuage, i. 40, 253, 274. iii. 297
Espousals, iv. 52
Essoins, i. 115, 405. ii. 75, 122, 149, 185, 303, 314, 443
——— *de malo lecti*, i. 412
Examination by justices of peace, iv. 493
Exceptions, iv. 29
——— bill of, ii. 188
Exchequer, court of, i. 50. ii. 51, 423. iii. 199
Exchequer, black and red book of the, i. 219
——— *dialogue of the*, i. 220
Excommunication, i. 472. iv. 40
Execution, writs of, iii. 114
Executors, ii. 168, 435. iv. 69, 74, 235, 364, 380, 527
Executory devise, iii. 369
Exemplification of letters patent, iv. 465
Ex Officio. Vide Office
Ex post facto, law, iv. 489, 566
Extortion, ii. 126
Eyre, justices in, i. 52, 201, 346. ii. 168
—— proceedings in, ii. 1
False judgment, i. 153. ii. 71, 444
—— tokens, iv. 292
Falsi crimen, i. 200
Falsifying recoveries, iii. 361
Fama patriæ, ii. 51
Fama publica, i. 192
Fealty, i. 277, 311. ii. 311. iii. 307
Feigned recovery, ii. 150, 191. iii. 203, 325, 361. iv. 238, 337
Felonia de seipso, ii. 11
Felonies repealed, iv. 267
Feoffments, i. 90
Feuds, whether among the Saxons, i. 8
——— established, i. 34
——— modern writers on, i. 44. in the notes
——— books of, ii. 55
Fines of land, i. 92, 148. ii. 224, 304. iv. 128, 135, 334, 456, 467
Fine and non-claim, i. 477
First-fruits, iv. 214
——— and tenths, court of, iv. 258
Fitzherbert, iv. 415
Fleta, ii. 279
Folcland, i. 5
Forcible entry, iii. 202, 229, 289, 397
Foreign jurisdiction, ii. 383
——— county, iii. 130, 287
——— deeds, ii. 330, 445
Forest laws, i. 206. ii. 106. iii. 214
Forestâ charta de, i. 231, 254
Forestalling, ii. 399. iv. 457
Forfeiture, i. 120, 197, 252. ii. 21, 310, 454. iii. 140, 251
Forging of deeds, iii. 262, 399
Fortescue, sir John, *de laudibus*, &c. iv. 112
Fourcher by essoin, ii. 122, 150
Frankalmoigne, i. 303. iii. 303
Frankmarriage, iii. 347
Frankpledge, i. 13, 194, 246
Fraudulent gifts, ii. 401. iv. 140
Frays in churchyards, iv. 485
Freehold, plea of, ii. 341
Fresh suit, ii. 15, 130, 154
Fresh force, assise of, ii. 152. iii. 28
Games, unlawful, iii. 170, 238, 293. iv. 292
Game-laws, iii. 214. iv. 144, 289, 292
Gaming-houses, iv. 456
Gaol-delivery, justices of, i. 57. ii. 173, 431. iv. 466
Garnishment, iii. 448
Gavelet, ii. 298
Gavelkind, ii. 310
Gifts of land, i. 289
——— simple, i. 292
——— conditional, i. 294
Glanville, i. 221. iv. 570
Grants of the crown, iii. 224
Gypsies, iv. 290, 490
Half-blood, i. 310. ii. 246, 317. iii. 3
Hengham, ii. 281
Henry I. i. 211
Henry II. i. 211
Henry III. ii. 82
Henry IV. iii. 252
Henry V. iii. 266
Henry VI. iv. 108
Henry VII. iv. 183
Henry VIII. iv. 400
Heresy, iii 234, 260
Homage, i. 123, 154, 235, 277. ii. 309, 311. iii. 306
Homage auncestrel, iii. 305

Homicide, i. 198. ii. 9, 153, 276. iii. 118, 248, 409. iv. 176
Hors de ſon fee, iii. 455
Horſe-ſtealing, iv. 484
HOWARD, MONS. ii. 88, 283. in the notes, iv. 116
Hue and Cry, ii. 15, 213
Indentures, i. 89
Ideots and lunatics, ii. 307
Indictments, ii. 211, 459, 468. iii. 131
Infangthef, ii. 40
Infants ſuing, ii. 180
Informations, iii. 94. iv. 151
Ingroſſing, ii. 399
Inns of court and chancery, ii. 91, 359. iii. 152: iv. 120, 124, 433, 573
Inquiſitions eccleſiaſtical, iv. 36
Inſidiatores viarum, &c. iii. 239
Inſtruments, iv. 28
Interdict, iv. 42
Interpleader, iii. 450
Inteſtates' effects, i. 73, 244, 307, 309. ii. 167, 334, 386. iii. 67. iv. 70, 206, 553
Intruſion, i. 320
Inventory, iv. 78
IRELAND, ii. 302, 364, 366. iii. 175, 256, 261, iv. 189
——— *ſtatutum Hiberniæ*, i. 259
——— *ordinatio pro ſtatu Hiberniæ*, ii. 99
Jactitation of marriage, iv. 64
Jointenants, ii. 243. iii. 349. iv. 235
Jointures, iv. 140, 246, 512, 524
Judges, ii. 91, 285. iii. 153, 200. iv. 123, 188, 435
Judicium dei, i. 197
Juriſdiction, i. 452. ii. 40, 113, 114, 246, 397
Jurors, qualification of, i. 329. ii. 184, 446. iii. 241, 259, 280. iv. 262
——— perjury of, i. 131
Jury, trial by, i. 24, 83, 328. ii. 137, 267, 272, 300, 332. iii. 103, 183, 293. iv. 195
—— grand, ii. 3, 31. iii. 133, 241, 286. iv. 298
—— petty, ii. 137, 268, 271, 459. iii. 121, 135, 248
—— *de medietate linguæ*, ii. 395, 461
Knight's fee, ii. 288
Knighthood, ii. 288
Knight's ſervice, iii. 297
Labourers, ſtatutes of, ii. 388. iii. 169, 223, 272, 286
LANCASTER, county palatine of, ii. 387. iii. 262, 264, 285, 288
Larceny, i. 17, 250. ii. 40, 274, 351. iii. 122, 410. iv. 178, 282
——— petty, ii. 274, 275. iii. 123
——— in a houſe, iv. 286, 472, 477
Law-wager, i. 458. ii. 259, 333, 447. iii. 97, 231, 401. iv. 172
Læſione fidei, ſuits *de*, i. 74, 164. ii. 79, 217. iv. 98
Leaſe by tenant for life, iv. 332
——— in tail, iv. 233, 333
Leaſe and releaſe, iii. 357. iv. 355
Legacies, i. 72, 308
Legate, iv. 6
Legem, trial *per*, i. 197, 377
Legitimacy, i. 117
Libel, iii. 257. iv. 13
Licence to alien, ii. 307, 371
Limitation of actions, i. 264, 316. ii. 124, 307. iv. 267, 467
LITTLETON'S Tenures, iv. 113
Livery of ſeiſin, i. 303
Liveries, ſtatutes of, iii. 158, 272
Lollards, iii. 235, 240, 260
Lombard merchants, ii. 397
LYNDWODE'S *provinciale*, iv. 117
Magna Charta of KING JOHN, i. 209
——— HENRY III. i. 231
——— confirmation of, i. 258
Maintenance, ii. 126, 457
Majus jus, i. 476
Malicious miſchief, iv. 290
Manſlaughter, iv. 393, 534
Marchers, lords, ii. 94, 368
Maritagium, i. 121, 297
Maritime Law, iii. 198
Marriage, iv. 52, 220, 545
——— of heirs, i. 116
——— of widows, i. 240
Marriage-money, iii. 65, 373. iv. 65
MARROW, iv. 186
Marſhals, various, iii. 196
Marſhal, cuſtody of the, ii. 421. iii. 387

Master of the Rolls, iii. 154
Mayhem, ii. 34, 35. 238
Merchants, ii. 158
Merchant strangers, i. 234
Merchant, tenant by statute, ii. 162
Mesne, writ of, ii. 198
Minority, plea of, i. 468
MIRROR of JUSTICES, ii. 282, 358
Misprision of treason, iv. 470, 477
Missio in bona, iv. 20
Mortauncestor, i. 178, 358
——— pleas thereto, i. 181
Mortgage, or *mortuum vadium*, i. 161, 163, 187. iii. 338
Mortmain, i. 240. ii. 154, 230, 377. iii. 168
Mortuaries, iv. 207
Multiplication, iii. 237
Murder, iv. 393, 534
Murdrum, i. 17, 198. ii. 10, 22, 77
Namium, i. 52
Natura Brevium, old, iii. 151
Natural-born subjects, ii. 400, 445
Negative pregnant, iii. 435
Nisi prius, justices of, ii. 170, 308, 313, 426. iii. 199, 201
Non-claim, statute of, ii. 401
Nonage, ii. 117
Non plevin, ii. 443
Non-tenure, i. 475. ii. 445. iii. 459
Norman Conquest, i. 28
——— conqueror, his laws, i. 32
Norman law, i. 205
Northampton, statute of, i. 87, 195
Novæ narrationes, iii. 152
Novel disseisin, assise of, i. 189, 324, 332
Nuisance, i. 344, 345. iii. 27, 212
Nullus liber homo, &c. i. 249
Nuptiæ, iv. 55
Oath of calumny, iv. 16
Office, inquests of, ii. 373
——— proceeding by, iv. 398, 568
Official, iv. 5
OLERON, laws of, i. 212. iii. 198
Ordeal, i. 20, 34, 194. ii. 24
Orders, holy, iv. 6
Ordinances, iii. 147
Outlawry, ii. 16, 437, 465. iii. 121, 140, 241, 263, 286. iv. 260
OWEN, sir ROGER, i. 8. in the note
Oyer and terminer, justices of, ii. 169, 461. iii. 132
Palatine, counties, i. 48. ii. 367. iv. 197
Papal authority abolished, iv. 214
——— restored, iv. 444
Parceners, i. 259, 473. ii. 306. iii. 345
Pardon, ii. 464. iii. 212, 239
Pares curiæ, i. 85, 246, 247, 249. ii. 7
Parliament, ii. 368. iv. 203
——— judicature of, ii. 406. iii. 181, 225, 376
——— members of, iii. 157, 220, 255, 268
——— rolls, ii. 278
Pauperis, suits *in formâ*, iv. 142
Partition of lands, i. 312
Peace, the king's, ii. 213, 458, 468
——— keepers of the, ii. 468
——— justices of the, ii. 472. iii. 216, 242, 265, 296. iv. 155
Peers, trial of, iii. 247. iv. 491
Peeresses, trial of, iii. 288
Peine forte et dure, ii. 134. iii. 133, 250, 418
Perjury, ii. 353
Perpetuities, iii. 324. iv. 159
Pernors of profits, iii. 173, 230, 275. iv. 139
Person, pleas to the, i. 463
PHILIP and MARY, iv. 555, 558
Pilgrimages, iii. 172
Pious uses, iv. 70, 80, 551
Pie-powder-justice, i. 404
——— court of, iii. 292
Pleading, i. 177, 451. iii. 95, 423, 474
——— to be in English, ii. 449
——— in writing, iii. 95, 427
——— forms of, iii. 386, 463
——— manner of, ii. 344
——— order of, ii. 266
Pluralities, iv. 208
Poisoning, iv. 282
Poor-laws, iv. 225, 451
Popular actions, iv. 141
Possession, i. 319
Præcipe in capite, i. 250

Præmunire, ii. 384. iii. 166, 222, 256
Prærogativa regis, ii. 305
Precedence, iv. 223
Precontracts, iv. 221
Prerogative, i. 305. ii. 307, 376. iv. 555
——— and law, i. 203
——— court, iv. 104
Preſcription, i. 305
Preſentments, ii. 221, 459
Preſident and council of the North, iv. 378
Preſſing of ſeamen, iii. 213
Pretended titles, iv. 291
Prieſts, iv. 6
Primer ſeiſin, ii. 306
Primogeniture, i. 40
Principal and acceſſary, ii. 133. iii. 124, 248. iv. 339 +
Printing of law-books, iv. 119, 186, 423, 571
Priſoners, iii. 205
Priſon-breaking, ii. 290
Private acts, iii. 379. iv. 129
Probate of wills, iv. 206
Proceſs in real actions, i. 403. ii. 238
——— in perſonal actions, i. 480. ii. 437
——— execution of, i. 484. ii. 181, 302, 442. iii. 115, 262
Proclamation of the king, iv. 277, 556
——— writs of, iii. 263, 277. iv. 261, 465
Proctor, iv. 13
Prohibitions, i. 141, 453. ii. 79, 216, 217, 244, 377. iv. 106
Proofs, trial by, iii. 99
——— in the eccleſiaſtical law, iv. 23
Prophecies, iv. 319
Proprietas, i. 319, 365
Protections, ii. 231, 241. iii. 115, 206, 406
Proteſtation, iii. 437
Proviſors, ii. 379. iii. 162, 166, 221, 223
Provors, ii. 43, 457. iii. 130, 239 417
Puniſhments, i. 14, 193, 257. ii. 352
Purgation, ii. 134. iv. 38
Purpreſſure, i. 156
Purveyance, i. 237. ii. 109, 203, 369, 456. iii. 160, 273. iv. 450
Quare ejecit infra terminum, i. 341. iii. 28
——— *impedit*, i. 194, 354
Queen, her authority, iv. 448
Quo warranto, ii. 220
Rape, i. 200. ii. 38, 125, 211
Rastell, John and William, iv. 418
Rationabilis pars, ii. 334. iii. 67. iv. 82
Receipt, ii. 151, 191, 228. iii. 203
Recogniſance in nature of a ſtatute ſtaple, iv. 253
Recognitions, various, i. 177, 366, 367
Recompence in value, i. 447. iii. 14
Records, i. 95, 151, 218. ii. 361, 423
Rediſſeiſin, i. 263. ii. 76, 206
Reformation of the eccleſiaſtical law, iv. 542
——— of religion, iv. 205, 437, 443
Regiam majeſtatem, i. 225
Regiſter of writs, iv. 426
Releaſe, i. 93. iii. 354
Relief, i. 32, 126, 235, 283. ii, 63, 231
Religious houſes, ii. 157
——— orders, iii. 222
Remainders, ii. 319. iii. 7
Remitter, iii. 21. iv. 522
Rents, iii. 316
Repleader, iii. 472
Replevin, ii. 46, 69, 112, 176. iii. 82, 446
Repreſentation, i. 41
Requeſts, court of, iv. 377, 557
Reſidence, iv. 208, 217
Reſtitution, iii. 128. iv. 288
Reveland, i. 5
Reverſions, i. 300
Revivor of ſtatute 25 Hen. VIII. c. 3. iv. 479
Richard I. i. 212
Richard II. iii. 217
Right, writ of, turned into a writ of entry, i. 388
——— in the lord's court, i. 399

Rights

+ ſemble p. 539

Rights to incorporeal things, i. 306
Riots, ii. 454. iii. 202, 241, 263. iv. 145, 475, 487
Robbery, i. 199. iv. 538
SAINT GERMAIN, iv. 416
Sale of offices, iv. 458
—— of horſes, iv. 464
Sanctuary, i. 19. iii. 137, 420. iv. 182, 314, 320
Saxon laws, i. 3, 25
———— collections of, i. 27
———— confirmed, i. 30
Scandalum Magnatum, ii. 129. iii. 211
Scire facias, ii. 189
———— for tythes, ii. 378
Sealed charters, i. 11, 88
Secta and *Sectatores*, i. 22, 248, 265, 377, 459. ii. 70, 128, 259, 330, 332. iii. 95
Seiſin, i. 177
Separation, iv. 549
Sequeſtration, iv. 22
Serjeant counter, ii. 128, 284. iv. 121
Serjeanty, i. 273. iii. 302
Services, reſervation of free, i. 271
Service and ſuit, ii. 64
Sheriffs, ii. 235, 297, 402, 460. iii. 259, 281, 293. iv. 144
——— judicature of, i. 250
Six articles, ſtatute of the, iv. 278
Slavery, i. 5. iv. 452, 485
Socage, i. 38. iii. 298
——— villain, i. 270
——— guardian in, i. 286. ii. 64. iii. 299
SOMERSET, duke of, tried, iv. 561
Spoliation, iv. 18, 96
Staple, ſtatute of the, ii. 393
Star chamber, iv. 146
Statutes, form and ſtyle of, i. 215. ii. 142, 153 (in the note) 354. iii. 143, 252, 379. iv. 111, 130, 411
Statuta vetera et nova, ii. 85, 354. iii. 143
——— *incerti temporis*, ii. 312, 316
Statute of *Magna Charta*, ſt. 9. Henry III. ch. 1. i. 233; 2. 235; 3. ibid.; 4. 336; 5. ibid.; 6, 337; 7, 342; 8, 343; 9, 234; 10, 244; 11. ibid.; 12, 245; 13, 246; 14, 247; 15, 234; 16. ibid.; 17, 250; 18, 243; 19, 237; 20. ibid.; 21, 238; 22, 252; 23, 234; 25, 234; 26, 252; 27, 238; 28, 248; 29, 249; 30, 234; 31, 239; 32, ibid.; 33, 237; 34, 251; 35, 246; 36, 241; 37, 253
Statutum chartæ de Foreſta, i. 254
——— *Hiberniæ, de cohæredibus*, 14 Hen. III. i. 259
Statutum de Merton, 20 Hen. III. 260. Ch. 1. 262; 2. ibid.; 3. 264; 4. 263; 5. 262; 6. 261; 7. ibid.; 8. 262; 9. 266; 10. 265; 11. 266
——— *de anno biſſextili*, 21 Hen. III. i. 266
Statute of confirmation of the charters, 38 Hen. III. 258
Statutum dies communes in banco, 51 Henry III. ii. 56
——— *dies communes in banco in placito dotis*, 51 Hen. III. ii. 60
——— *de diſtrictione Scaccarii*, 51 Hen. III. ii. 61
Statute of Marlbridge, 52 Hen. III. ii. 62. ch. 1. 67; 2. ibid.; 3. 68; 4. ibid.; 5. 78; 6. 63. 66; 7. 74; 8. 76; 9. 65; 10. 76; 11. 70; 12. 75; 13. ibid.; 14. 71; 15. 69; 16. 64; 17. ibid.; 18. 72; 19. 75; 20. 71; 21. 69; 22. ibid.; 23. 73. 74; 24. 77; 25. ibid.; 26. 76; 27. 77; 28. 73; 29. 72
Statute of Weſtm. 1. 3 Ed. 1. ii. 107. ch. 1. 108; 2. 134; 3. 125; 4. 108; 5. 109; 6. 130; 7. 109; 8. 125; 9. 131; 10. 129; 11. 131; 12. 135; 13. 125; 14. 133; 15. 132; 16. 112; 17. ibid.; 18. 130; 19. ; 20. 126; 21. 110; 22. ibid.; 23. 114; 24. 116; 25. 126; 26. 127; 27. ibid.; 28. ibid.; 29. 128; 30. ibid.; 31. 109; 32. ibid.; 33. 128; 34. 129; 35. 114. 36. 111; 37. 117; 38. ibid.; 39. 124; 40. 120;

120; 41. ibid.; 42. 122; 43. 123; 44. ibid.; 45. 124; 46. 115; 47. 117; 48. 111; 49. 120; 50. 139; 51. 116
Statutum extenta manerii, ſt. 4. Ed. I. ſt. 1. 140
Statute of bigamy, ſt. 4 Ed. I. ſt. 3. vol. ii. 141. ch. 1. 142; 2. ibid.; 3. 143; 4. ibid.; 5. ibid.; 6. 144
Statute of Glouceſter, ſt. 6 Ed. I. ii. 144. ch. 1. 148; 2. 150; 3. 146; 4. 145; 5. 149; 6. 150; 7. 147; 8. 149; 9. 154; 10. 150; 11. ibid.; 12. 152; 13. ibid.; 14. ibid.
Statutum de religioſis, ſtat. 7 Ed. I. ſt. 2. ii. 154
——— Acton Burnell *de mercatoribus*, 11 Ed. I. ii. 158
Statutum Walliæ, 12 Ed. I. ii. 95
Stat. of Weſtm. 2. 13 Ed. I. ſt. 1. ii. 164. ch. 1. 164; 2. 176; 3. 190; 4. 191; 5. 194; 6. 185; 7. 197; 8. 198; 9. 199; 10. 169; 11. 178; 12. 210; 13. 211; 14. 180; 15. ibid.; 16. 208; 17. 185; 18. 187; 19. 167; 20. 201; 21. ibid.; 22. 180; 23. 168; 24. 202; 25. 204; 26. 206; 27. 185.; 28. 186; 29. 169; 30. 170; 31. 188; 32. 155; 33. 157; 34. 211; 35. 207; 36. 175; 37. 181; 38. 184; 39. 181; 40. 191; 41. 156; 42. 212; 43. 175; 44. 212; 45. 189; 46. 209; 48. 186; 49. 212; 50. 212
Statute of Wincheſter, 13 Ed. I. ſt. 2. ii. 213
——— of merchants, 13 Ed. I. ſt. 3. 160
——— of *circumſpecte agatis*, 13 Ed. I. ſt. 4. 215
Stat. forma conceſſionis et confirmationis chartarum, 13 Ed. I. ſt. 6. 100
— *ordinatio pro ſtatu Hiberniæ*, 17 Ed. I. 99
— *quia emptores terrarum*, 18 Ed. I. ſt. 1. 223
— *quo warranto*, 18 Ed. I. ſt. 2. 219
— *modus levandi fines*, 18 Ed. I. ſt. 4. 224
Stat. 20 Ed. I. ſt. 1. of vouchers, 227
——— ſt. 2. of waſte, 227
——— ſt. 3. *de defenſione juris*, 228
——— ſt. 4. *ſtatutum de monetâ*; ſt. 5. *ſtatutum de monetâ parvum*; ſt. 6. *articuli de monetâ*, 228
— *de iis qui ponendi ſunt in aſſiſis*, 21 Ed. I. ſt. 1. 184
— 21 Ed. I. ſt. 2. *de malefactoribus in parcis*, 229
— 24 Ed. I. of the writ of conſultation, 217
— *confirmationes chartarum*, 25 Ed. I. ſt. 1. 101
— *Sententia Domini R. archiepiſcopi, ſuper præmiſſis*, 25 Ed. I. ſt. 2. 103
— *de finibus levatis*, 27 Ed. I. ſt. 1. ch. 1. 225; 2. 229; 3. 173; 4. 164
— 27 Ed. I. ſt. 2. *ordinatio de libertatibus perquirendis*, 230
——— ſt. 3. *ſtatutum de falſo monetâ*, 228
— for perſons appealed, 28 Ed. I. ſt. 2. 174
— *articuli ſuper chartas*, ſtat. 28 Ed. I. ſt. 3. ch. 1. 103. 241; 2. 233; 3. 236; 4. 237; 5. 238; 6. ibid.; 7. 239; 8. 235; 9. 184; 10. 240; 11. ibid.; 12. 234; 13. 235; 14. 235; 15. 238; 16. 239; 17. 241; 18. 234; 19. ibid.; 20. 241
— 28 Ed. I. ſt. 1. of wards and relief, 231
— 29 Ed. I. *amoveas manum*, 241
— 33 Ed. I. ſt. 1. *ſtatutum de protectionibus*, 241
——— ſt. 2. definition of conſpirators, 242
——— ſt. 3. of champerty, 243
— *Ordinatio Foreſtæ*, 33 Ed. I. ſt. 5. 104
— 34 Ed. I. ſt. 1. *de conjunctim feoffatis*, 243
— 34 Ed. I. ſt. 3. 231
— *de tallagio non concedendo*, 34 Ed. I. ſt. 4. 104

Stat. ordinatio foreſtæ, 34 Ed. I. ſt. 5. 106
— *de aſportatis religioſorum*, ſtat. 35 Ed. I. ſt. 1. 157
— *de militibus*, 1 Ed. 2. 288
— *de frangentibus priſonam*, 1 Ed. II. 290
— *articuli cleri*, 9 Ed. II. 291
— 9 Ed. II. ſt. 2. 297
— of Gavelet, 10 Ed. II. 298
— 12 Ed. II. ſt. 1. 299
——— ſt. 2. 303
— 15 Ed. II. 304
— *Prærogativa regis*, ſtat. 17 Ed. II. ſt. 1. c. 1. 2. 305; 3. 4. 5. 306; 6. 7. 8. 307; 9. 10. 308; 11. 12. 13. 309; 14. 15. 316; 16. 311
— *modus faciendi homagium et fidelitatem*, ſtat. 17 Ed. II. ſt. 2. 311
— *ſtatuta incerti temporis*, 312. 316
— of Ragman *de juſtitiariis aſſignatis*, 312
— *de magnis aſſiſis et duellis*, 314
— *de viſu terræ et eſſonio de ſervitio regis*, 314
— *pro tenentibus per legem Angliæ*, 315
— 1 Ed. III. ſt. 1. c. 4. 444; 6. 434; 16. 469
——— ſt. 2. c. 12. 371
— 2 Ed. III. c. 3. 455; 17. 436
— 4 Ed. III. c. 2. 470; 7. 435; 14. 368
— 5 Ed. III. c. 2. 420; 8. 421; 9. 369; 12. 13. 437
— 9 Ed. III. ſt. 1. c. 2. 443; 4. 445
— 14 Ed. III. ſt. 1. c. 4. 461; 6. 448; 16. 427; 17. 436; 18. 444
——— ſt. 5. 367
— 18 Ed. III. ſt. 1. 466
——— ſt. 2. c. 2. 471; 5. 467
— 18 Ed. III. ſt. 3. c. 1. 462; 3. 377
— 20 Ed. III. c. 6. 428
— 23 Ed. III. 388
— 25 Ed. III. ſt. 1. 390
——— ſt. 2. 400
——— ſt. 3. ch. 1. 378; 2. 462; 3. 463; 9. 468
— 25 Ed. III. ſt. 5. c. 2. 451; 4. 418; 5. 435; 8. 372; 11. ibid.; 17. 438; 22. 380
——— ſt. 6. 380
— 27 Ed. III. ſt. 1. ch. 1. 384; 2. 465
——— ſt. 2. 393
— 28 Ed. III. ch. 3. 369; 13. 461
— 31 Ed. III. ſt. 1. ch. 4. 386; 12. 423
——— ſt. 2. ch. 11. 387
——— ſt. 4. 364
— 34 Ed. III. ch. 1. 472; 7. 435; 10. 391; 12. 454; 16. 401
— 36 Ed. III. ſt. 1. c. 12. 473; 13. 374; 15. 449
— 37 Ed. III. c. 2. 374; 18. 419; 19. 456
— 38 Ed. III. ſt. 1. c. 5. 447
——— ſt. 2. 385
— 42 Ed. III. c. 3. 419; 5. 374; 11. 429
— 50 Ed. III. c. 6. 401
— 1 Rich. II. c. 3. iii. 160; 5. 199; 6. 157; 7. 159; 12. 205
— 1 Rich. II. ſt. 2. c. 9. 173
— 2 Rich. II. ſt. 1. c. 5. 211; 6. 210
——— ſt. 2. c. 2. 211; 3. 174
— 3 Rich. II. c. 3. 161
— 5 Rich. II. ſt. 1. c. 6. 207. 211; 9. 11. 12. 13. 14. 15. 16. 199
— 5 Rich. II. ſt. 2. c. 4. 157; 5. 163
— 6 Rich. II. ſt. 1. c. 2. 3. 204; 6. 179; 11. 201
— 7 Rich. II. c. 7. 201; 10. 202; 12. 164. 176
— 8 Rich. II. c. 2, 3, 4. 200
— 9 Rich. II. c. 1. 200; 3. 203; 4. 204
— 11 Rich. II. c. 11. 201
— 12 Rich. II. c. 3, 4, 5, 6, 7. 170; 8. 172; 11. 212; 15. 164
— 13 Rich. II. ſt. 1. c. 2. 195; 3. 198; 8. 173; 13. 215; 17. 204
——— ſt. 2. c. 2. 164; 3. 165

Stat. 15 Rich. II. c. 2. 202; 3. 197; 5. 176; 6. 168
— 16 Rich. II. c. 4. 159; 5. 166
— 17 Rich. II. c. 6. 181. 194; 8. 211
— 20 Rich. II. c. 1. 159; 3. 201
— 21 Rich. II. c. 3. 209; 4. 210; 9. 156; 20. 210
— 1 Hen. IV. c. 1. 234; 6. 224; 8. 230
— 2 Hen. IV. c. 3. 221; 4. 223; 15. 235
— 4 Hen. IV. c. 2. 239; 7. 230; 12. 222; 18. 233; 23. 227
— 5 Hen. IV. c. 4. 238; 10. 223; 243
— 7 Hen. IV. c. 15. 220
— 11 Hen. IV. c. 1. 221
— 13 Hen. IV. c. 7. 241
— 17 Hen. IV. c. 17. 223
— 1 Hen. V. c. 1. 255; 3. 262; 5. 257
— 2 Hen. V. ſt. 1. c. 4. 265; 6. 265
— 2 Hen. V. ſt. 1. c. 7. 260; 8. 263; 9. 263
— 2 Hen. V. ſt. 2. c. 2. 259
— 3 Hen. V. ſt. 1. c. 1. 261
— 3 Hen. V. ſt. 2. c. 4. 256; 8. 256
— 9 Hen. V. c. 4. 258
— 2 Hen. VI. c. 17. 285
— 4 Hen. VI. c. 3. 278
— 6 Hen. VI. c. 1. 286; 4. 286
— 8 Hen. VI. c. 1. 268; 7. 269. 271; 9. 289; 10. 287; 12. 279; 15. 279
— 9 Hen. VI. c. 6. 285
— 10 Hen. VI. c. 6. 288
— 11 Hen. VI. c. 1. 268; 3. 275; 4. 276; 11. 270
— 14 Hen. VI. c. 4. 290
— 15 Hen. VI. c. 4. 274
— 18 Hen. VI. c. 11. 290; 14. 280
— 20 Hen. VI. c. 9. 288
— 23 Hen. VI. c. 8. 281; 11. 271
— 31 Hen. VI. c. 2. 273; 9. 277
— 33 Hen. VI. c. 1. 277; 7. 284
— 1 Ed. IV. c. 2. 291
— 17 Ed. IV. c. 2. 292; 4. 293
— Rich. III. c. 1. iv. 127; 2. 127; 3. 128; 7. 129
— 1 Hen. VII. c. 4. 158
Stat. 2 Hen. VII. c. 1. 132
— 3 Hen. VII. c. 1. 146. 153; 2. 145; 3. 154; 4. 140; 10. 141; 14. 145
— 4 Hen. VII. c. 12. 155; 13. 156; 17. 139; 20. 141; 24. 135
— 7 Hen. VII. c. 1. 157
— 10 Hen. VII. c. 7. 134
— 11 Hen. VII. c. 3. 151; 12. 142; 18. 132. 144; 20. 140; 24. 143
— 12 Hen. VII. c. 7. 157
— 19 Hen. VII. c. 1. 133; 9. 143; 15. 139
— 1 Hen. VIII. c. 8. 231
— 4 Hen. VIII. c. 2. 286
— 6 Hen. VIII. c. 3. 229; 4. 261; 16. 203
— 7 Hen. VIII. c. 4. 238
— 14 and 15 Hen. VIII. c. 2. 229; 8. 219
— 21 Hen. VIII. c. 2. 314; 4. 241; 5. 206; 6. 207; 7. 283; 11. 288; 13. 207; 15. 232. 238; 16. 229; 19. 238
— 22 Hen. VIII. c. 9. 282; 12. 225; 14. 314
— 23 Hen. VIII. c. 1. 286; 3. 264; 6. 253; 9. 211; 10. 237; 20. 211
— 24 Hen. VIII. c. 5. 281; 12. 212
— 25 Hen. VIII. c. 3. 317; 14. 213; 16. 209; 19. 213; 20. 214; 21. 214; 22. 219. 273
— 26 Hen. VIII. c. 1. 216; 3. 216; 4. 195; 6. 195. 299; 11. 196; 12. 196; 13. 274. 299; 14. 216
— 27 Hen. VIII. c. 2. 274; 4. 302; 5. 7. 197; 10. 243; 15. 216; 19. 320; 20. 222; 24. 197; 25. 227; 26. 198. 204; 27. 257; 28. 216
— 28 Hen. VIII. c. 7. 220. 274; 10. 276; 13. 217; 18. 277
— 31 Hen. VIII. c. 1. 236; 2. 289; 3. 237; 8. 277; 9. 217; 10. 223; 13. 217. 235; 14. 218. 278
— 32 Hen. VIII. c. 1. 248; 2. 267; 7. 222.; 9. 291; 12. 320; 16. 230; 21. 268; 26. 218;

28. 233; 30. 266; 31. 239; 32. 236; 33. 236; 34. 235; 36. 239; 37. 235; 38. 220
Stat. 33 Hen. VIII. c. 1. 292; 6. 294; 12. 303; 21. 280; 28. 209; 39. 257. 259
— 34 and 35 Hen. VIII. c. 1. 318. 250. 279; 4. 254; 13. 204; 14. 319; 20. 240; 26. 200
— 35 Hen. VIII. c. 3. 281; 6. 262; 11. 204
— 37 Hen. VIII. c. 9. 256; 10. 297; 12. 223; 17. 229; 19. 240
— 1 Ed. VI. c. 1. 437; 3. 451; 7. 466; 12. 438. 467
— 2 and 3 Ed. VI. c. 1. 439. 474; 5. 475; 8. 462; 13. 458; 25. 465; 33. 484
— 3 and 4 Ed. VI. c. 26. 453
— 5 and 6 Ed. VI. c. 1. 441; 2. 454; 4. 485; 9. 477; 10. 483; 11. 495; 12. 442; 16. 458; 20. 457
— 1 Ma. ſt. 1. c. 1. 486
——— 2 c. 3. 443; 5. 467; 12. 487
——— 3. c. 1. 448
— 1 and 2 Ph. and Ma. c. 4. 490; 8. 445; 9. 489; 11. 487; 12. 463; 13. 493
— 2 and 3 Ph. and Ma. c. 4. 464
— 4 and 5 Ph. and Ma. c. 5. 480. 491; 8. 491
STATHAM'S abridgement, iv. 117
STAUNFORDE, iv. 569
Stealing of women, iii. 179, 277. iv. 145, 491
STEPHEN, king, i. 211
Steward and marſhal's court, ii. 235, 248, 252, 420. iii. 275
Subpœna, writs of, iii. 192, 227, 274
Suggeſtions, iii. 94, 228, 229
Suitors of court, ii. 128. Vide *ſectatores*
Summons, i. 119, 403
——— and ſeverance, iii. 462
Superſtitious uſes, iv. 237
Suppoſititious children, i. 311
Surveyors, court of, iv. 257
Suſpenſion, iv. 43
Swainmotes, i. 256
Sylva cædua, ii. 388. iv. 89
Tales de circumſtantibus, iv. 263. 467
Tallages, ii. 104
Thanes, i. 5
Tenant in tail after poſſibility, &c. iii. 6. 322
Tenths, iv. 461
Tenures, i. 34, 276. iii. 296
——— oppreſſions of, 1, 207
——— *in capite*, i. 238, 239
——— as of an honour, i. 238
Tenures, book of old, iii. 151
Term, gifts for a, i. 301
——— of years, iii. 335. iv. 232, 324, 330
——— protected, ii. 150
Terms and vacations, i. 191. ii. 115
——— and returns, ii. 56, 75, 115
Thainland, i. 5
THORNTON, ii. 281
THROCKMORTON, ſir NICHOLAS, tried, iv. 562
Tipling-houſes, iv. 456
Tourn, i. 6. 246. ii. 76, 404. iii. 291
Trade and commerce, ii. 392, 398. iv. 229
Tranſactio, iv. 13
Traverſe, ii. 339. iii. 482
——— of offices, iv. 462
Treaſon, i. 195. ii. 5. 273, 349, 450. iii. 116, 207, 217, 408. iv. 144, 175, 272, 297
——— ſtatute of, ii. 451
——— petit, iv. 533
Treaſons enacted, iii. 207, 285. iv. 144, 469, 475, 476, 489
——— repealed, iii. 234. iv. 467, 486
Treaſure trove, i. 198. ii. 9
Treſpaſs, i. 338. ii. 45, 342
——— actions of, ii. 263, 340, 435. iii. 84
——— with a *continuando*, iii, 87
Treſpaſſers in parks, &c. i. 266. ii. 126, 229. iv. 144, 289
Trials, various, i. 376. iv. 305, 470
——— of treaſon, ii. 7. iv. 299
——— in a foreign country, iv. 396, 483
——— of pirates, iv. 301

Trials of bloodshed in the palace, iv. 303
Trinity Term altered, iv. 268
Trover, iv. 526
Truce and safe-conduct, iii. 265, 268
Trusts, iii. 175. iv. 520
Tythes, ii. 378. iii. 221, 223. iv. 85, 222, 458, 553
Uniformity, act of, iv. 441
Usury, i. 119, 262. iv. 256, 457
Uses, iii. 169, 173, 364, 386. iv. 126, 139, 159, 340, 516
—— statute of, iv. 242
Vagrants, iv. 134, 227, 451
Vavasors, i. 268
Venue, iii. 107, 204
Verdicts of recognitors of assise, i. 329
—— of Jurors, ii. 267. iii. 105
Verge, tenants by the, iii. 314
Vetitum namium, ii. 46
Vicarages, iii. 167, 222
View, i. 433. ii. 186
Villains, i. 99, 142, 268. iii. 157
Villainous judgment, iii. 127
Villenage, i. 39, 270. iii. 308
—— plea of, ii. 445
WALES, iii. 285
—— judicature in, ii. 95. iv. 193
Ward of the king, ii. 305, 374
—— writ of right, ii. 74
Wards and liveries, court of, iv. 258
Wardship, i. 113, 235, 260, 284. ii. 62, 110, 149, 207, 231, 234, 305. iii. 301
—— by priority and posteriority, i. 285. ii. 208
Warranty, i. 438. ii. 142, 144
—— with assets, ii. 318, 323. iii. 11
—— vouching to, i. 132, 167, 437. ii. 120, 152, 185, 227, 444
—— of tenant by the curtesy, ii. 145
Warrantia Chartæ, i. 451
Waste, i. 384. ii. 73, 148, 152, 227, 234, 436
—— prohibition of, ii. 180
Welsh, iii. 261
Were, i. 15
WICKLIFFE's followers, iii. 163, 235, 240
WILLIAM THE CONQUEROR, i. 210
—— his laws, i. 213
—— RUFUS, i. 211
Widows of the king, ii. 306, 309
Will, tenant at, i. 303. iii. 336. iv. 304
Wills and testaments, i. 11, 111, 307. iv. 66, 72, 550
—— probate of, i. 72. ii. 386. iv. 76, 206
—— of land, i. 363. iii. 8, iv. 360
—— statute of, iv. 248
Witnesses, ii. 300, 445. iii. 113. iv. 15, 24
—— in treason, iv. 477, 495, 530
Witchcraft, iv. 318
Whitbernam, ii. 49
Wittenagemote, i. 7
Wreck, ii. 9, 108, 308
Writs, i. 94, 461
— patent and close, iii. 45
— different kinds of, i. 318. ii. 203
— *ad quod damnum*, ii. 230
— annuity, ii. 258
— *assisa utrum*, i. 366
— *attachment sur prohibition*, i. 457
— attaint, i. 373
— *auditâ querelâ*, iii. 57
— certificate of assise, i. 376
— *cessavit de cantariâ per biennium*, iii. 50
— *cessavit per biennium de fædi firmâ*, ii. 145. iii. 50, 326
— *de chartis reddendis*, iii. 72
— assise of common, i. 342
— *de communi custodiâ*, ii. 74, 208, 325
— *in consimili casu*, ii. 202, 204, 212. iii. 40
— conspiracy, ii. 239
— *de consuetudinibus et servitiis*, iii. 54
— *contra formam collationis*, ii. 156, 327
— *contra formam feoffamenti*, ii. 65, 326. iii. 54
— *de contributione*, ii. 327
— cosenage, i. 364

Writ of covenant, ii. 262
— *cui in vitâ*, ii. 190
— *darrein preſentment*, i. 185. ii. 194. iii. 44
— debt, i. 158. ii. 256
— deceit, ii. 329
— *dedimus poteſtatem*, iii. 57
— detinue, ii. 261
— *diem clauſit extremum*, ii. 327
— dower *unde nihil*, i. 146. iii. 378
— *de ejectione firmæ*, iii. 29
— *elegit*, ii. 187
— entry *ſur diſſeiſin*, i. 340. iii. 33
— entry in the *poſt*, ii. 72
——— *dum non fuit compos mentis*, iii. 31
——— *dum fuit infra ætatem*, iii. 48
——— *ſur cui ante divortium*, iii. 38
——— *cauſâ matrimonii prælocuti*, iii. 38
——— of intruſion, i. 396. iii.
——— *ad communem legem*, iii. 39
——— *ad terminum qui præteriit*, i. 388. iii. 30
——— *ſur cui in vitâ*, i. 394. iii. 36
——— *ſine aſſenſu capituli*, i. 395. iii. 36
——— of eſcheat, i. 395
——— *in caſu proviſo*, ii. 147
— *de errore corrigendo*, iii. 57
— eſtrepement, ii. 152. iii. 53
— *de falſo judicio*, iii. 56
— *fieri facias*, ii. 187
— *formedon*, ii. 166, 320. iii. 41
— *ex gravi querelâ*, iii. 9, 49
— *de hæretico comburendo*, iii. 235
— *de homagio recipiendo*, i. 154
— *de idemptitate nominis*, ii. 374. iii. 237
— *indicavit*, i. 141. ii. 197
— intruſion, i. 320
— *juris utrum*, iii. 44
— *juſticies*, i. 156, 173
— *magnum cape*, i. 418
— meſne, ii. 198
Writ *de moderatâ miſericordiâ*, i. 248. iii. 56
— *monſtravit de compoto*, ii. 73
— *monſtraverunt*, ii. 327. iii. 55
— *mortauncеſtor*, i. 178
— *de nativis*, i. 142
— novel diſſeiſin, i. 189, 325
— nuiſance, i. 344
— *nuper obiit*, i. 433. iii. 49
— *de odio et atiâ*, i. 198, 252
— *parvum cape*, i. 424
— *de ſecundâ ſuperoneratione paſturæ*, ii. 180. iii. 53
— admeaſurement of paſture, ii. 197. iii. 52
— *de perambulatione faciendâ*, iii. 48
— *de plegiis acquietandis*, i. 159. iii. 65
— *pone*, i. 402
— *præmunire*, ii. 386
— prohibition, i. 142, 175, 456
— *quale jus*, iii. 57
— *quare ejecit infra terminum*, i. 341
— *quare impedit et quare non permittit*, i. 355. ii. 194. iii. 44
— *quare incumbravit*, iii. ibid.
— *quid juris clamat*, ii. 327
— *quo jure*, or *quo warranto*, i. 343, 426. iii. 52
— *quo warranto*, ii. 221
— *quod ei deforceat*, i. 395. ii. 193
— *quod permittat*, i. 345, 366. ii. 202. iii. 50
— *quod permittat habere aiſiamenta*, i. 343
— *quod permittat habere rationabile eſtoverium*, i. 344. iii. 51
— *de rationabilibus diviſis*, i. 157. iii. 48
— recognition *ut de fædo vel ut de vadio*, i. 187
——— *ut de fædo vel ut de wardâ*, i. 183
— *recordari facias*, i. 153
— right in the *curia regis*, i. 114
——— lord's court, i. 172. iii. 45
——— *quia dominus remiſit curiam*, iii. 45
——— *ſur diſclaimer*, ii. 47. iii. 54
——— in London, iii. 46

Writ of entry of *de rationabili parte*, iii. 47, 49
——— *secundum consuetudinem manerii*, iii. 47
——— of advowson, i, 137. iii. 44
——— of right of dower, i. 144, 383. iii. 43, 44
— *scire facias*, ii. 327
— *secta ad molendinum*, ii. 327
— *de servitio regis*, i. 422
— to summon jurors, i. 128, 129
— *de vi laicâ removendâ*, iii. 44
— *de uxore abductâ cum bonis viri*, ii. 211
Writ of ejectment of ward, ii. 208, 325
— intrusion of ward, iii. 54
— ravishment of ward, ii. 207, 325
Year-book of Edward II. ii. 357
——— III. iii. 147
——— Henry IV. iii. 254
——— Henry VI. and Edward IV. iv. 112
——— Edward V. and Richard III. iv. 126
——— Henry VII. iv. 185
——— Henry VIII. iv. 414

Eq. L. 581.
b/20/11